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No. 16101

In the

Supreme Court of the United States

No. 16101

WILLIAM BIRDWELL, *et al.*,
Appellants,

v.

J. M. KIRKLAND, *et al.*,
Appellees.

WILLIAM BIRDWELL, *et al.*,
Appellants,

v.

AMERICAN BONDING COMPANY OF BALTIMORE, *et al.*,
Appellees.

Appeals from the Court of Civil Appeals of Texas for the Second Supreme Judicial District at Fort Worth

STATEMENT AS TO JURISDICTION

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In the

Supreme Court of the United States

No. 16104

WILLIAM BIRDWELL, *et al.*,
Appellants,

v.

J. M. KIRKLAND, *et al.*,
Appellees.

WILLIAM BIRDWELL, *et al.*,
Appellants,

v.

AMERICAN BONDING COMPANY OF BALTIMORE, *et al.*,
Appellees.

Appeals from the Court of Civil Appeals of Texas for the Second Supreme Judicial District at Fort Worth

STATEMENT AS TO JURISDICTION

Appellants, William Birdwell and Lee Green, submit herewith their statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the Court of Civil Appeals of Texas for the Second Supreme Judicial District at Fort Worth, Texas,

in Cause No. 16104, affirming the summary judgment granted in favor of the bonding companies against plaintiffs, now appellants, and for all costs accrued therein against them, and also from a final judgment in trespass to try title, affirming mineral rights in favor of appellees.

THE OPINION BELOW

The opinion of the Court of Civil Appeals at Fort Worth, Texas, has been officially reported in *337 S. W. 2d 120.* A copy of said opinion is attached hereto as Appendix A.

JURISDICTION

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Section 1257(2) of Title 28 of the United States Code.

STATUTES OF THE STATE INVOLVED

The statutes of the State, the validity of which is involved, is *Article 4291 of the R. C. S. of 1925 of the State of Texas* and provides as follows: "Sureties on Bond to be Cited. Upon the filing of such application (for removal), the sureties upon the bond of such guardian shall be cited by personal service to appear and show cause why such application should not be granted." Also *Article 1853 of the Revised Statutes of 1895*, provides that "all such decisions, orders, decrees and judgments shall be entered on the records of the court during the term at which the same are rendered, and any such decisions, order or decree or judg-

ment shall be a nullity unless of record". And also, *Article 5528 of the R. C. S. of 1925*, provides: "All suits on the bond of any executor, administrator or guardian shall be commenced and prosecuted within four years next after the death, resignation, removal or discharge of such executor, administrator or guardian, and not thereafter."

In the alternative, if the appeal is improvidently taken, then appellants invoke *Rule 28 U. S. C. A., Sec. 2103*, when it is to be regarded as a petition for certiorari.

DATE OF JUDGMENT AND OF APPLICATION FOR APPEAL

The opinion and judgment of the Court of Civil Appeals at Fort Worth, Texas, was rendered on May 27, 1960, rehearing denied without a written opinion on June 24, 1960; writ of error denied by the Supreme Court of Texas, October 26, 1960, and motion for rehearing overruled on November 23, 1960. The application for appeal was presented and filed on February 21, 1961.

CASES BELIEVED TO SUSTAIN JURISDICTION

The cases believed to sustain the jurisdiction of the Supreme Court of the United States are:

Senn v. Tile Layers Protective Union, 301 U. S. 467, 81 L. Ed. 1229;

King Mfg. Co. v. City Council of Augusta, 277 U. S. 100; 72 L. Ed. 801, 48 S. Ct. 489.

RAISING THE FEDERAL QUESTIONS

In the motion for rehearing in the Court of Civil Appeals, on Page 6 of said motion, and at the last paragraph of said page, the appellants stated: "Since the court held that the plaintiffs' cause of action against the bonding companies has been lost by limitation and that the period during which the plaintiffs should have filed their suit therefor was within four years after they reached their respective majorities * * * is in direct conflict with the Supreme Court case of *Allen v. Stovall, 63 S. W. 863,* * * * *Whitfield v. Burrell, 118 S. W. 156,* and all other cases on the subject; and * * * the decision is not due process of law, and repugnant to the 14th Amendment of the Constitution of the United States." And on Page 56 of said motion for rehearing, being the last page, the appellants stated: "That since the Court of Civil Appeals has failed to sustain the above and foregoing points of error, that said ruling and decision of this court is in conflict with each and every case cited under each point of error herein, and the same is not due process of law, and repugnant to and in violation of the 14th Amendment of the Constitution of the United States."

In its petition for writ of error in the Supreme Court of Texas, appellants specifically renewed their attack on the validity of the ruling of the Court of Civil Appeals in violation of the Fourteenth Amendment clause. In the second paragraph on the last page, 112, the appellants stated: "The Court of Civil Appeals has failed to sustain the above and foregoing points of error, and each of them, that said

ruling and decision of the Court of Civil Appeals is in conflict with each and every case cited under each point of error herein, and the decisions of the Court of Civil Appeals as heretofore set up in the petitioners' motion for rehearing in the Court of Civil Appeals, is depriving the petitioners of property without due process of law, and is repugnant to, and in violation of the Fourteenth Amendment of the Constitution of the United States."

And in the motion for rehearing in the Supreme Court of Texas, the attack again was renewed by appellants showing wherein both the Court of Civil Appeals and the Supreme Court erred and was in violation of the Due Process Clause of the F[illegible]teenth Amendment of the Constitution of the United [illegible]tes, which pages of said motion are on 31 and 32.

The [illegible]eral question was raised for the first time, and raised in time in the Court of Civil Appeals on a motion for a rehearing, which was the first opportunity to present the same after leaving the trial court. The construction placed upon the issues and questions by the Court of Civil Appeals trying the case was a surprise to the appellants herein, because the court's former decisions were at variance and in conflict with the decisions adopted by it at this time when the case was tried. This same principle is shown in *Brinkerhoff-Faris Trust & Savings Company v. Hill, 281 U. S. 673, 74 L. Ed. 1107*, holding:

> "A federal question raised for the first time on petition for rehearing in the highest court of the State is raised in time, where it is presented by a construction placed upon a statute by such court in its decision, at variance with a construction formerly adopted by it."

That the federal question was necessarily involved in the decision in the case at bar, and that the court could not have given the judgment or decree which they passed on without deciding it, because the record shows, an order or judgment of the court was obtained without citation, notice, appearance or waiver, and further shows that the orders and decrees of the court were void for lack of jurisdiction over the subject matter, which will all be shown in the consideration of the questions, all in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. *Murray v. Charleston, 96 U. S. 432, 24 L. Ed. 760.*

QUESTIONS PRESENTED

1. Whether as applied to the Probate Court of Bell County's order removing the guardianship from Bell County, Texas, to Young County, Texas, in violation of the statutes is repugnant to the Due Process Clause of the Fourteenth Amendment of the United States.

2. Whether the land in question, when it had already been sold, was the same in the possession and under the authority and jurisdiction of the guardian and probate court subject to contract and sale, and if such sale was void, would be in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

3. Whether the Probate Court of Young County, Texas, could order a sale of said land through the guardian's deed in confirmation and ratification of a former deed and conveyance not permitted by statute and violative of the Due

Process Clause of the Fourteenth Amendment of the Constitution of the United States.

4. Whether the guardian made a sale of said land and was benefitted and profited directly and indirectly in violation of the statute, was contrary to the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

5. Whether the Probate Court of Young County, Texas, in making the sale of said land, ordered the conveyance to be made when the money was paid to the guardian in compliance with the order of the Court and statutes, which was not paid when the conveyance was made, nor thereafter, and caused a failure of consideration of the purchase price of said land, and rendered the sale void, in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

6. Whether the suit on the Surety Companies' bond as applied to the appellants were liable to them on the ground that all of the proceedings, orders and judgments of the Probate Court of Young County, Texas, were void, and estopped the bonding companies from questioning the jurisdiction of the court and the invalidity of the record, and an adverse ruling thereon was in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

7. Whether the suit on the surety companies' bond as applied to the appellants, was lost by limitation when the wards failed to bring suit on the bonds within four (4)

years after they reached their majorities, but did bring suit on the bonds less than four (4) years after the guardian died and before the guardianship closed; and an adverse ruling on same was violative of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

8. Whether the two deeds in question were void and the oil and gas mineral rights were severed from the land, give the appellants the right to acquire the said minerals thereunder and a decision adverse thereto is in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

9. Whether appellants' motion for a summary judgment, supported by their affidavits, depositions, pleadings and records in the case, which showed no genuine issue of fact to be determined, and which motion was not controverted by the affidavits of the defendants, appellees, and a decision adverse to same is in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

STATEMENT

This is a suit in the nature of a bill of review instituted by the appellants in the Probate Court of Young County, Texas, on the 25th day of February, 1955, setting up the fact that G. W. Birdwell, guardian of the appellants, had qualified as guardian in Bell County, Texas, and had illegally and without authority of law removed the said guardianship from Bell County to Young County, Texas. When

it was removed the guardian attempted to sell the land of 80 acres belonging to the wards, the appellants herein, through the Probate Court of Young County, Texas, and the appellants set up the fact that the probate court did not have jurisdiction over the land, neither did the guardian, for the guardian had already sold the land while he was suspended, and without an order of the probate court on August 1, 1913, and the said sale had never been set aside. The appellants further set up many invalid acts and unlawful conduct on the part of the guardian in the sale of said land, and among other things alleged and showed that the land was sold by said guardian by order of the court, report and confirmation order and the deed were executed by the guardian and delivered to the purchaser in violation of the order of the court and statutes in the failure of the purchaser to pay the consideration when the conveyance was made nor any time thereafter, and caused a total failure of consideration of the purchase price. Appellants further alleged and showed that the application to sell, order of sale, report of sale, and the confirmation order and all proceedings were void in said probate court, and asked the court to set them aside. On the trial of the case in the probate court on the 15th day of December, 1955, the probate court sustained the defendants' exceptions, pleas in abatement, and pleas to the jurisdiction, and overruled appellants' pleas in abatement to the jurisdiction of the court, whereupon the plaintiffs excepted and gave notice of appeal and duly effected their appeal to the District Court of Young County, Texas.

Upon the appeal to the said district court, the appellants renewed their plea in abatement to the jurisdiction of the probate court, and sought again to set aside all of the proceedings in said court. Also the appellants filed suit in the said District Court in trespass to try title on the 13th day of May, 1955, seeking to set aside the invalid deeds of the guardian, and for the possession and title to said land as their interest might appear, and in the alternative for a judgment against the bonding companies, for the defalcation of the guardian, and made a motion for summary judgment. In trespass to try title, the appellees plead adverse possession of three, five, ten and 25 year statute of limitation. The bonding companies urged special exceptions and the four year statute of limitations to the appellants' cause of action, and set up motion for summary judgment.

Furthermore, the said case was appealed from the probate court and the said trespass to try title both being in the district court were consolidated by the order of the court, and were set down for a pre-trial hearing on the 4th day of June, 1959, and at the pre-trial hearing, without any oral testimony being admitted by either side, the trial court, being of the opinion that the plaintiffs did not plead and show a cause of action, overruled all of their pleas to the jurisdiction of the court, their exceptions, and motions for summary judgment; but sustained all of the defendants' exceptions, and the bonding companies' motion for summary judgment, pleas in abatement and limitation pleas, whereas the appellants excepted and gave notice of appeal to the Court of Civil Appeals of Texas, for the Second Supreme

Judicial District at Fort Worth, and duly effected their appeal.

These federal questions were expressly passed upon by the Court of Civil Appeals at Fort Worth, Texas, because of the fact that said court found that the appellants' suit on the bonds was barred by the four-year statute of limitation in that the release of the sureties by the probate court's order was valid and subsisting. This ruling and decision is the same as holding that all of the proceedings, orders, judgments and releases of the Probate Court of Young County, Texas, are valid and subsisting, and all of the points of error and questions herein should be overruled, holding in effect that void orders and judgments are barred. To the same effect is the ruling of said Court of Civil Appeals with reference to the mineral rights set up in favor of appellants when they showed the court that both deeds were void, and the minerals were severed from the soil, and appellants should recover, but said court refused to hold the said orders and proceedings of the probate court and deed void, but valid and subsisting, which is shown under "Question 8".

STATEMENT OF THE GROUNDS UPON WHICH IT IS CONTENDED THE QUESTIONS INVOLVED ARE SUBSTANTIAL:

QUESTION 1

In consideration of the first question, whether as applied to the Probate Court of Bell County's order removing the guardianship from Bell County, Texas, to Young County,

Texas, in violation of the statutes, repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

(1) The removal order was void for the following reasons:

The American Bonding Company of Baltimore, appellee, made application to the Probate Court of Bell County, Texas, to be discharged from all liability for the future acts of said guardian; and in consideration of said application on the 4th day of April, 1910, the court ordered the guardian to give a new bond in the amount of $3,000.00 on or before the 20th day of April, 1910, "with surety or sureties to be approved by this court". A new bond was not given until the 16th day of August, 1913, a period of about three (3) years and 4 months, when the guardian had the court to approve on said day, a bond executed by the American Surety Company of New York in the sum of $2,500.00, when the guardian made application and attempted to sell said wards', appellants, real estate. That said guardian, on the 17th day of October, 1910, made application to remove the guardianship from Bell County, Texas, to Young County, Texas; and that thereafter, on the 5th day of December, 1910, the said court entered a purported order, removing the said guardianship from Bell County to Young County, Texas.

That since the American Bonding Company of Baltimore made application to be released from said bond as shown above, and since a new bond was not given for a period of about three (3) years and four (4) months on August 16,

1913, as aforesaid, the said guardian was disqualified and suspended when the purported removal order was made by the court on December 5, 1910. *Article 4149 of the R. S. of 1925 of the State of Texas*, provides as follows:

> "When a guardian has been required to give a new bond, he shall thereafter refrain from acting as such guardian except to preserve the property in his charge, until he gives such new bond and the same has been approved, as such guardian."

Article 3398 of the R. S. of 1925, also applies and provides as follows:

> "Functions of executor suspended; when an executor or administrator is required to give a new bond, the order requiring such bond shall have effect to suspend the powers of such executor or administrator, and he shall not thereafter pay out any money of said estate or do any other official act, except to preserve the property of the estate, until such new bond has been given and approved."

Also *Article 4108* applies and provides as follows:

> "Laws applicable, the provisions, rules and regulations which govern estates of decedents shall apply to and govern guardianships, whenever same are applicable and not inconsistent with any provision of this title."

"Disregard of Mandatory or Statutory Provision. * * * Indeed, as a general proposition, any judgment which ignores a prohibitive statute may be regarded as void and subject to collateral attack." *25 Tex. Jur. p. 805 and 808, Sec. 307.* In *Grant v. Ellis, 50 S. W. 2d 1093*, the Supreme Court of Texas held: "34 C. J. 531, 532. We quote and adopt the following rule announced by the above authority: 'Where the

Constitution or a statute absolutely prohibits a court from doing a particular act, the order or judgment of the court made or rendered in violation thereof is absolutely void for want of jurisdiction and may be assailed in a collateral proceeding'." The Supreme Court of Texas in *Stallings v. Hullum, 35 S. W. 2*, further held: "What is prohibited in law is as clearly invalid as if it had been declared void." "No judgment of a court affords due process of law if rendered without jurisdiction. A judgment is void for want of due process where the court exceeds its jurisdiction, as where it renders a judgment not authorized by the pleadings, evidence, or findings, or without service of process sufficient to bring the parties before the court." *Davis v. Stanford Mill & Elevator Co., 260 S. W. 1081, Texas; U. S. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107; 16 A C. J. S., p. 835 and 836, Sec. 625.*

(2) The removal order was, and is further void as follows:

Because it was never put in the minutes of the Bell County Court according to the law and statute. All of the records of Bell County Probate Court have been introduced in evidence, and nowhere can it be found among the records and papers of the case where the said order was entered into the minutes of the court, nor was it ever filed, nor was the order entered of record at any time; and consequently said purported order is a nullity and void. That the clerk of the Bell County Probate Court furnished a complete record and same appears in the statement of facts filed in this court, S. F. 41. All of the records were well preserved, and the clerk certified

thereto that after making a diligent search she did not find the said removal order from Bell County to Young County, Texas, in the minutes of the court, nor was it ever entered or filed of record in said court. This certificate is admissible by the said clerk, for *Article 3731a, Sec. 5 of the R. S. of Texas*, provides:

> "A written statement signed by an officer having custody of an official record, or by his deputy, that after diligent search no record or entry, of a specified tenor, is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contained no such record."

In the case of *Blackwood's Estate, 49 S. W. 1045*, the Supreme Court of Texas held: "Under Article 2557 of the Revised Statutes of 1895, provides all decisions, orders and judgments of the court in matters of guardianship shall be rendered and entered on the minutes of the court at a regular term thereof, and in open court, except in cases where it is otherwise specially provided. * * * We think, however, that Article 1853, which provides that 'all such decisions, orders, decrees and judgments shall be entered on the records of the court during the term at which the same are rendered, and any such decision, order or decree or judgment shall be a nullity unless of record', applies as well to proceedings in guardianship as to proceedings in estate of decedents. * * * Article 2558 provides that 'the provisions, rules and regulations which govern estates of decedents shall apply to and govern guardianships, whenever the same is applicable and not inconsistent with any of the provisions of this title'. * * *

And we see no reason why it should not be held that the provisions of the statute above quoted, rendering null and void those made in reference to estates of decedents if not entered upon the record, are not applicable to orders made in matters of guardianship." *Blackwood v. Blackwood's Estate, Court of Civil Appeals, 47 S. W. 483*, held: "All decisions, orders and judgments not entered on the records of the court are nullities." *Kelsey v. Tristler, 74 S. W. 66*, held: "Guardian's deed was absolutely void whether order of sale, and order confirming sale, if made, were not entered on records of court. *Gallemore v. Owen, 69 S. W. 2d 469.*" That all of the above quoted statutes in the *Blackwood* case were in effect when removal order was attempted to be made on or about December 5, 1910; *Boucher v. Wallis, 236 S. W. 2d 519.*

A void judgment is not due process of law. "Due Process of law is essential to a valid judgment, and a void judgment confers no rights under the due-process clauses." *16 A C. J. S. p. 435, Sec. 625; Cal. Rediker v. Rediker, 221 P. 2d 1, 2 A. L. R. 2d 1152; Hyman v. Muller, 62 A. 2d 221.*

(3) The removal order was void for the third reason, as follows:

That on or about the 17th day of October, 1910, the said guardian filed an application in Bell County Court to move the guardianship to Young County, Texas, without citing the defendant surety, the American Bonding Company of Baltimore to appear and answer therein. Upon the application for the guardian to transfer the guardianship from one county to

another, it is necessary to issue citation to the sureties on the bond, citing them to appear and show cause why such application should not be granted, according to *Article 4291 of the R. S. of 1925 of the State of Texas*, which provides: "Sureties on Bond to be Cited. Upon the filing of such application (for removal), the sureties upon the bond of such guardian shall be cited by personal service to appear and show cause why such application should not be granted." Said surety was never cited to appear, because all of the records of Bell County, Texas, were introduced in evidence, and the same does not appear in the records, and according to the clerk's certificate, S. F. 41, the said citation was never issued and served on said surety, neither did it waive service nor appear in court. Neither does the record show that on the application to remove said guardianship, was citation ever issued by the clerk or anybody else, nor was there any return shown upon the citation or copied into the minutes of the court in compliance with Article 4106 of the R. S. of 1925 of the State of Texas. In fact, the entire record affirmatively shows that the citation was never issued, and the certificate of the clerk shows transcript complete (S. F. 42). The record also shows that the said surety did not appear. According to said statute the issuance of notice is mandatory, and is a prerequisite to the exercise of the jurisdiction to move said guardianship from Bell County, Texas, to Young County, Texas.

In the case of *Williamson v. Owens* the court held:

> "It seems that the proceedings can be attacked collaterally if there was absence of notice, and the orders complained of were thereby void for want of jurisdic-

tion. 21 Tex. Jur. Sec. 9, p. 214, and cases therein cited. Generally a judgment without service is void." Rule 124 * * *. "According to the general rule, the judgment rendered by a court having no jurisdiction is a mere nullity and will be so held and treated whenever and for whatever purpose it is sought to be used." *33 C. J. Sec. 34 and 37, pp. 1072 and 1076.*

Again, "Want of Process or Service. In a personal action the issuance of process and the service thereof upon the defendant is necessary to confer jurisdiction upon the court, and if no process is issued, or if service is not made on defendant, the judgment will be void and subject to collateral attack, unless service is waived by voluntary appearance or otherwise." *34 C. J. p. 533, Sec. 836 C.* However, we finally found the purported removal order in the Young County Probate Court, several years after the removal of said guardianship, but do not know how it got there.

Furthermore, by the inspection of such judgment of removal we see that it is vulnerable to collateral attack for it does not cite notice or jurisdictional facts (Tr. 8). *Lamesa Rural High School District v. Speck, 253 S. W. 2d 315.* Also said guardian was otherwise disqualified to remove said guardianship as shown above under Question 1, Section 1, wherein it is shown that he failed to give bond according to law and the statutes and order of the court, and was disqualified and suspended and not permitted to act as guardian; and also under Question 1, Section 2, as above set out, the guardian was disqualified to act in not having the removal order in the minutes of the court according to law and the statutes.

Notice

"Notice to a party whose rights are to be affected by judicial proceedings is an essential element of due process." *Simon v. Southern R. Co., 236 U. S. 115, 59 L. Ed. 492; Old Wayne Mut. Life Assoc. v. McDonough, 204 U. S. 8, 51 L. Ed. 345; Simon v. Craft, 182 U. S. 427, 45 L. Ed. 1165.*

QUESTION 2

We come now to the consideration of the second question, whether the land in question, when it had already been sold, was the same in the possession and under the authority and jurisdiction of the guardian and the Probate Court of Young County, Texas, subject to contract and sale, and if such sale was void, would be in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

On August 1, 1913, George W. Birdwell and wife, Mollie Birdwell, executed a conveyance to J. M. Kirkland of Young County, Texas, without an order of the Probate Court, and while the said guardian, George W. Birdwell, was suspended and disqualified by the court of Bell County, Texas, on April 4, 1910; and that at said time of the conveyance the said land was owned by the wards, the appellants herein (S. F. 46). On August 27, 1913, the said guardian filed an application to sell said 80 acres of land through the Probate Court of Young County, Texas, being the same land as above shown that was sold by George W. Birdwell and wife, Mollie Birdwell, to J. M. Kirkland on August 1, 1913; that said

land was duly put through the regular channels of the Probate Court, and same was purported to be sold through the guardian to J. M. Kirkland, and a guardian's deed was purported to be executed on the 20th day of October, 1913 (S. F. 57). Both deeds were filed for record in the Deed Records of Young County, Texas, on the 24th day of October, 1913. The said deed of August 1, 1913, was never set aside and canceled when the guardian's deed was executed on the said 20th day of October, 1913. That said consideration was paid and to be paid by the purchaser, J. M. Kirkland, as stated in said deed of August 1, 1913, title was purported to be passed, as testified to by the deposition of J. M. Kirkland on March 18, 1955 (S. F. 66 and 68); and that all of the notes in said deed of August 1, 1913, were dated and executed on August 1, 1913; and that the said J. M. Kirkland stated in his said deposition that that was the only consideration passed for said land (S. F. 68); and that there was no consideration given and passed for the purported conveyance by the guardian of October 20, 1913, although the guardian's deed stated so.

George Berry, the District Clerk of Young County, Texas, was placed on the witness stand by the appellants, and he testified that he examined the District Court Records of Young County, Texas, and that the deed of August 1, 1913, executed by George W. Birdwell and wife, Mollie Birdwell, to J. M. Kirkland containing 80 acres of land, had never been set aside nor canceled (S. F. 132).

As above shown, the guardian had never taken steps to rescind, to cancel or set aside the deed of conveyance of Au-

gust 1, 1913, and at the time of the application to sell said land on August 27, 1913, the said land had not passed into the possession of the guardian and under the control and supervision of the guardian and the probate court, neither did the guardian nor the probate court have jurisdiction over said land subject to contract or conveyance, when the said guardian attempted to make a conveyance of the same through a guardian's deed on October 20, 1913. In *Neal v. Holt, 69 S. W. 2d 603, writ of error denied by the Supreme Court of Texas*, the appellants say that this case is directly in point, and are relying on it mostly for a reversal of this case, which holds in part:

> "The guardian, under the statutory authority to take possession of all property belonging to the ward, may be deemed to have the incidental power to bring suit to rescind the voidable sale made by his ward. Article 4163 expressly gives the guardian the right to recover possession of all property to which the ward has a 'title or claim'. But until the necessary steps are taken of rescission by suit and decree, the land could not be regarded as within the possession of the guardian and under the immediate contract and supervision of the guardian and the Probate Court. Therefore, in view of such legal situation of the land, and the terms of the guardian's application for sale, it may not be held that the land itself was in the possession and under the authority and jurisdiction of the guardian and the Probate Court subject to contract or conveyance in respect thereto by the guardian, or a purpose was presented for which a sale is authorized by the statute." * * * It is further held: "In the present case, though, the Probate Court orders in controversy were not merely voidable, but were void as without the jurisdiction of the Probate Court to entertain and make."

In the case of *Withers v. Patterson, 27 Texas 491*, the Supreme Court of Texas held:

> "Let us suppose that A., being the owner of lands, dies intestate, and his estate is committed to the county court for administration: Let us suppose that a certain tract of land belonging to the estate is sold upon the petition of the administrator, and purchased by B., that the sale is confirmed by the court, the purchase money paid by B., and title made to him by the administrator. Let us suppose that afterwards, in the progress of the same administration, the administrator applies, with all formality, for the sale of the same land, that the court orders the sale, that the administrator sells in obedience to the order, and the land is purchased by C., the sale to him confirmed, the purchase money paid, and a deed duly executed by the administrator. Has C., in such case, acquired any title to the land? Certainly not. And why? Simply because the court had no power to order the sale at which he purchased. The land did not belong to the estate. * * * All the proceedings of the court in the progress of such an administration are null and void, and may be shown to be so in any collateral proceeding in which they are relied on to support a claim of right. And in the case of a rightful administration, every order or judgment which the law has not conferred upon the court the power to make or render is a nullity, and may be impeached collaterally, by showing from the record itself the want of power in the court to make or render the order or judgment in question.

"The inclusion of property not his own, in his schedule of assets, gave no jurisdiction over such property to the bankrupt court, and the judgment and sale of such property was null and void", and subject to collateral attack. *Hornsby v. Hornsby, 70 S. W. 2d 489, Texas; Buss v. Smith, 125 S. W. 2d 712 and 714; Norse v. Shackelford, 9 F. 2d 967.*

This second federal question herein as shown above is substantial for the reason that the Probate Court of Young County, Texas, when the guardian's deed was made to said land, did not have jurisdiction over the land, and jurisdiction of the res is essential to the validity of a judgment in rem, for it is held:

> "Proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law." *Colton v. Menefee, 237 U. S. 189, 59 L. Ed. 919; Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 43 L. Ed. 569; 12 C. J., p. 1226, Sec. 1001.*

> "Jurisdiction of the person is essential to the validity of a judgment in personam, and jurisdiction of the res is essential to the validity of a judgment in rem." *12 C. J., p. 1226, Sec. 1001.* Nor can you waive or consent to jurisdiction.

> "No waiver or consent can cure a want of jurisdiction of the subject matter." *Sinsheimer v. Simonson, 107 Fed. 898, 184 U. S. 18, 46 L. Ed. 415.*

This case at bar wherein the probate court did not have jurisdiction over the land, neither did the guardian, for the same had already been sold, and not in existence in their possession, the same is analogous to the case wherein an administrator took out an administration on a live man, wherein the dead man was not in existence, and the live man did not have notice, the court was without jurisdiction, and the judgment was wholly void, and was not due process of law.

> "The appointment of the probate court of an administrator of the estate of a living person, without

notice to him, being without jurisdiction, and wholly void; the receipt of the money by the administrator is no discharge of the debt; and the conveyance of the property by the administrator passes no title," and the same is not due process of law. *Scott v. McNeal, 154 U. S. 34, 38 L. Ed. 896.*

QUESTION 3

The third question is whether the Probate Court of Young County, Texas, could order a sale of said land through the guardian's deed in confirmation and ratification of a former deed and conveyance not permitted by statute and violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Since the conveyance of said land owned by said wards was executed by George W. Birdwell and wife, Mollie Birdwell, on August 1, 1913, and the purchase price was paid and secured to be paid by J. M. Kirkland at said time, and the deed was delivered to him, and since the guardian's deed was made to the said J. M. Kirkland on October 20, 1913, without setting aside the former conveyance, and in the said guardian's deed the consideration was never paid nor expected to be paid, but there was a complete failure of consideration, and it is, and was obvious and plain that it was the intention of all parties thereto, as in the following case of *Neal v. Holt*, that the said guardian's deed was made and executed in ratification and confirmation of the said deed of August 1, 1913, which the statutes do not permit, and rendered the said guardian's sale void and subject to collateral

attack. In the case of *Neal v. Holt, 69 S. W. 2d 603 and 609*, the court held:

"And it is concluded that, in the absence of express statutory provisions, neither the guardian nor the probate court, nor all together can ratify or confirm a conveyance of land by the ward made previous to the guardianship. * * *. The powers of the probate court, in respect to the estates of minors, and as truly estate of a person of unsound mind, are all conferred by statute. Whatever the statute authorized the probate court to do, it might rightfully do. And it is as certainly plain, that if the probate court orders a sale of land when the circumstances do not exist, which, under the law authorizes it to do so, it acts, in doing so, without authority. If the order of sale was a nullity, the confirmation of such sale could not legalize it." And *Withers v. Patterson, 27 Tex. 491 and 496*, the Supreme Court of Texas holds and quotes the same thing.

"Probate Court's ordering guardian's sale to confirm proceeding in another county condemning ward's property held unauthorized, rendering sale void." *City of Tyler v. First National Bank of Beaumont, et al., 46 S. W. 454.*

"The deed sought to be canceled is void because the application of the guardian, the order of the court, and the approval order, as well as the deed, show that the probate court had not the power to authorize the guardian to exchange the lands of the wards. Therefore the orders were subject to collateral attack." *Crier v. Cowden, et al., 251 S. W. 822. O'Connor v. Vineyard, et al., 43 S. W. 55; Harrison v. Barngrover, 72 S. W. 2d 271, writ of error refused.*

"We conclude that the order of the county court in the guardianship proceedings, authorizing and confirming the exchange of the annuity bequeathed to the minor, Dorris Commander, for the shares of stock in Fakes and Company was void on its face, because of

lack of any statutory authority therefor; in other words, because it was in excess of the powers delegated by the statutes." *Commander v. Bryan, et al., 123 S. W. 2d 1008*, further citing *Martin v. Augadahl, 247 U. S. 142*, it was held that a judgment may be attacked collaterally as void for lack of jurisdiction of the subject matter or of the person of the defendant, even when the judgment recites findings of jurisdictional facts, such as service of summons upon the defendant. Which is in keeping with the guaranty of due process of law by the Federal and State Constitutions.

QUESTION 4

Whether the guardian made a sale of said land and was benefitted and profited directly or indirectly in violation of the statute, was contrary to the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

That the statement made by the guardian in the report of the sale in the Probate Court of Young County, Texas, just before the guardian's deed was made, that $512.50 in cash had been paid, was not true; because on August 1, 1913, as a part of the consideration in payment for the wards' land of 80 acres as part of the purchase price, G. W. Birdwell, guardian, accepted in payment from J. W. Kirkland two horses valued at $400.00, and $112.50 in cash; the said two horses were for the benefit and profit of said guardian, G. W. Birdwell; and said transaction rendered the judgment void in violation of a mandatory statute. That the purchase of said horses by said guardian was a direct violation of

Article 4205 of the R. C. S. of 1925, which provides as follows:

> "The guardian shall not become the purchaser either directly or indirectly of any property of the estate sold by him. If any guardian shall, directly or indirectly, become the purchaser of any property of his ward at a sale made by such guardian, upon written complaint of any person, and after service of citation upon such guardian, and upon proof, such sale shall be held void and by the court set aside by order to that effect, * * *."

In proof of same, the deposition taken of J. M. Kirkland on March 18, 1955, shows that when he purchased said land on the 1st day of August, 1913, as a part of the consideration in payment for the wards' land of 80 acres as part of the cash purchase price, G. W. Birdwell, guardian, accepted payment from J. M. Kirkland two horses valued at $400.00, and $112.50 in cash; that said deposition provides as follows (S. F. 65 and 67):

> "Int. 6. The records show the consideration for said 80 acres of land from G. W. Birdwell and wife, Mollie Birdwell, to be $2,000.00, to be paid as follows: $512.50 cash and et cetera * * *. Was the consideration recited in said deed the true consideration paid by you to G. W. Birdwell for said land?
>
> "To the 6th Int. the witness answers: Yes.
>
> "Int. 7. Was the cash consideration of $512.50 paid by you in cash to G. W. Birdwell on the date of the deed, August 1, 1913?
>
> "To the 7th Int. the witness answers: Yes.
>
> "Int. 8. Did you pay any part of said consideration in livestock?
>
> "To the 8th Int. the witness answers: Yes.

"Int. 9. Did you deliver to G. W. Birdwell on August 1, 1913, the time said deed was made, one mare named 'Ann' and one 'Stallion' as part of the cash consideration?

"To the 9th Int. the witness answered: Yes.

"Int. 10. What value was placed upon said livestock?

"To the 10th Int. the witness answered: $400.00.

That in violation of said statute, the order of sale, the confirmation order, and all proceedings of the probate court should be set aside; that said sale and orders of the court are void, the statutory provision is mandatory, and the same is within the prohibition of the statute and subject to collateral attack. In the case of *Wall v. Wall, 172 S. W. 2d 181*, holds:

"The statute prohibiting the guardian of a minor's estate from becoming a purchaser of any property of the estate sold by him, and declaring a sale to be void, is 'mandatory' and unambiguous and requires no construction * * *.

"The sale of an incompetent's undivided interest in realty to husband of incompetent's guardian is a partition proceeding was in effect a sale to the guardian within the prohibition of statute, and sale was void. Art. 4205." And in a case analogous to this is *Simpson v. Booth, 163 S. W. 2d 1080*, which holds in part:

"And that, too, only upon the guardian giving bond in an amount equal to double the value of the personal property then on hand, and the amount for which said real estate may be sold. These provisions of the statute are by the legislature expressly made mandatory, and unless followed, the sale of the ward's real estate is declared to be void. Art. 4216 * * *, the purchaser acquired no title and the owner, Annie Booth, is still the owner of her undivided interest in the land, free of

any encumbrance or laches subsequently accruing; and the guardian of the ward may not ratify or confirm the void proceedings affecting the title, and the invalidity thereof may not be waived by any acts, omissions or commission of the guardian." *Parker v. Bowers, 64 S. W. 380*, and *Bishop v. Creek, 199 S. W. 367*, construe Article 4205, violation of guardian.

When the guardian's deed was attempted to be executed on October 20, 1913, through the probate court, in confirmation and ratification of the deed of August 1, 1913, wherein the guardian, in violation of Article 4205, profited and benefitted from the sale in taking in horses as part of the purchase price for said land, that said sale was not susceptible of ratification or confirmation, for it is held in *Commander v. Bryan, 123 S. W. 2d 1008 and 1015:*

"A void judgment 'is not susceptible of ratification or confirmation, and its invalidity may not be waived'."

A further holding that said statute is mandatory, and violation of same is subject to collateral attack is in the following cases: Our Supreme Court of Texas held in *Grant v. Ellis, 50 S. W. 2d 1093:*

"We quote and adopt the following rule announced by the * * * authority, 34 C. J. 531 and 532: 'Where the constitution or a statute absolutely prohibits a court from doing a particular act, the order or judgment of the court made or rendered in violation thereof is absolutely void for want of jurisdiction and may be assailed in any collateral proceeding.'" Also, *25 Tex. Jur., p. 808, Sec. 307*, quotes: "Indeed, as a general proposition, any judgment which ignores a prohibitive statute may be regarded as void and subject to collateral attack." "What is prohibited in law is as clearly invalid as if it had been declared void." *Stallings v. Hullum, 35 S. W. 2. Supreme Court of Texas.*

The said question is substantial, for it is held: "No judgment of a court affords due process of law if rendered without jurisdiction. A judgment is void for want of due process, where the court exceeds its jurisdiction, as where it renders a judgment not authorized by the pleadings, evidence, or findings, or without service of process sufficient to bring the parties before the court." *U. S. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107.*

QUESTION 5

Whether the Probate Court of Young County, Texas, in making the sale of said land, ordered the conveyance to be made when the money was paid to the guardian in compliance with the order of the court and statutes, which was not paid when the conveyance was made, nor thereafter, and caused a failure of consideration of the purchase price of said land, and rendered the sale void, in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

On the 1st day of August, 1913, George W. Birdwell and wife, Mollie Birdwell, executed a conveyance to J. M. Kirkland, in consideration of Two Thousand $(2,000.00) and No/100 Dollars, to them paid and secured to be paid by J. M. Kirkland as follows: The sum of $512.50 cash in hand, and the assumption to pay three notes as follows: Two notes for the sum of $100 each, and one note for the sum of $600.00, bearing ten per cent interest, and due and payable to the Bonner Loan and Investment Company of Dallas, Texas, on November 1, 1913, 1914, and 1915 respectively; three other notes of even date herewith as follows: Two notes

for the sum of $200.00 each, and one note for the sum of $287.50, bearing eight per cent interest, and due and payable to G. W. Birdwell at Olney, Texas, on October 1, 1916, 1917 and 1918 respectively (S. F. 56).

Now in selling said 80 acres of land by said guardian through the probate court, the guardian reported the sale in words substantially as shown in said deed of August 1, 1913, and showing the same consideration, which report was on the 13th day of October, 1913, and the confirmation order shows the same consideration; and the confirmation order further stated, "It is further ordered that the said G. W. Birdwell, guardian as aforesaid, make a proper conveyance of the said land to the said J. M. Kirkland upon his compliance with the said terms of sale" (S. F. 52).

It is stated in said guardian's deed: "Now, therefore, in consideration of the premises and of the sum of $512.50 to me in hand paid, the receipt of which is hereby acknowledged and the assumption by the said J. M. Kirkland and the agreement on his part to pay off and discharge at maturity thereof one certain real estate note secured by mortgage on the hereinafter described real estate in the sum of $800.00 held by the Bonners of Dallas, Texas, and the execution and delivery to me as such guardian as aforesaid, of his three certain notes of even date herewith for the sum of $200.00 due October 15, 1915; $200.00 due October 15, 1916, and $287.50 due October 15, 1917, each bearing interest from the date at the rate of 8 per cent per annum (S. F. 57).

"Witness my hand on this, the 20th day of October, 1913.

"G. W. Birdwell, Guardian."

Now, therefore, in view of the above and foregoing facts, the guardian was ordered by the court in the confirmation order to make a proper conveyance to J. M. Kirkland upon his compliance with the said terms of sale. In violation of said court order, and in violation of the statute, Article 4216 and Article 4220 of the Civil Statutes of 1925 of the State of Texas, J. M. Kirkland did not pay the guardian anything when said guardian's deed was executed on October 20, 1913, nor at any time thereafter. The conveyance was without any consideration whatever, and there was a total failure of consideration for the entire purchase price of said 80 acres of land owned by said wards.

In corroboration of the above facts, J. M. Kirkland testified by deposition on March 18, 1955, the following:

"Int. 6. The records show the consideration for said 80 acres of land from G. W. Birdwell and wife Mollie Birdwell, to be $2,000.00 to be paid as follows: $512.50 cash. * * * Three other notes of even date herewith, (August 1, 1913) as follows: Two notes for the sum of $200.00 each, and one note in the sum of $287.50 bearing eight per cent per annum interest, and due and payable to G. W. Birdwell at Olney, Texas, on October 1, 1916, 1917 and 1918 respectively. Was the consideration recited in said deed the true consideration paid by you to G. W. Birdwell for said land?

"To the 6th Int. the witness answers: Yes.

"Int. 21. According to the record as above shown, the deed from G. W. Birdwell and wife, Mollie Birdwell, dated August 1, 1913, to J. M. Kirkland shows a total consideration of $2,000.00 that J. M. Kirkland paid for said 80 acres of land. Did you ever pay, after August 1, 1913, any more than that for the land to G. W. Birdwell?

"To the 21st Int. the witness answers: No, I did not.

"Int. 22. Was the $2,000.00 paid to G. W. Birdwell on August 1, 1913, all of the money you ever paid for the 80 acres of land?

"To the 22d Int. the witness answers: Yes, that is all." (S. F. 66 and 68.)

In *Neal v. Holt, 69 S. W. 2d 603 and 609*, held:

"And, in another point of fact, as found by the trial court, as respects the purchaser, there was failure of compliance with the terms of the sale, requiring as to him the setting aside of the order of confirmation of the sale of the ward's land. It is expressly provided by the statute as a prerequisite of conveyance to the purchaser the compliance by the purchaser with the terms of purchase. Article 4220, R. S.

"We believe the mineral deed from Wallis to Boucher, not being based upon any consideration, was and is void." *Boucher v. Wallis, 236 S. W. 2d 519 and 421; Simpson v. Booth, 163 S. W. 2d 1080.*

"Due process of law is essential to a valid judgment, and a void judgment confers no rights under the due process clauses." *Texas, Commander v. Bryan, 123 S. W. 2d 1008; 16A C. J. S., p. 835, Sec. 625.*

QUESTION 6

Whether the suit on the surety companies' bonds as applied to the appellants were liable to them on the ground that all of the proceedings, orders and judgments of the Probate Court of Young County, Texas, were void, and estopped the bonding companies from questioning the jurisdiction of the court and the invalidity of the record, and an adverse ruling thereon was in violation of the Due Process

Clause of the Fourteenth Amendment of the Constitution of the United States.

In the above and foregoing we see that under Question 1, the said guardian removed the guardianship from Bell County to Young County, Texas, under the proceedings and orders of the court which were illegal and void; and under Question 2, we note that the guardian attempted to convey the land of the wards, appellants, wherein the land was not in the possession and under the control and jurisdiction of the probate court and guardian, subject to contract and conveyance, which attempted conveyance by the orders of the court, rendered all the proceedings and orders of the court void and subject to collateral attack; and that under Question 3, we see that the said guardian, in attempting to make the conveyance of the wards' land, did so through the probate court in confirmation and ratification of the former deed of August 1, 1913, which orders of the court and deed were subject also to collateral attack, and void; and that under Question 4, we see that the guardian was guilty of directly or indirectly profiting from the wards' real estate sale in violation of the statute and court order, which rendered said sale void; and that we also see under Question 5, at the time of the attempted sale by the guardian to J. M. Kirkland by orders of the court and guardian's deed that there was a complete failure of consideration of the whole purchase price for the said land, which also rendered the sale void; and that from all of the above and foregoing, we see that all of the proceedings, orders and judgments of the Probate Court, in-

cluding the order of sale, report, confirmation order, and deed were all void and subject to collateral attack.

Now the Court of Civil Appeals has ruled and sustained the surety companies' motion for summary judgment in that the orders releasing the said sureties on the bonds were barred by the 4 year statute of limitation for they failed within 4 years when the wards reached their majorities to come into court and sue and set the orders aside releasing the sureties. That this decision and ruling by the Court of Civil Appeals has the effect of overruling all of the appellants' points of error and issues and questions herein set up and in the trial court, Court of Civil Appeals, and the Supreme Court of Texas, and the decision is that all of the proceedings in the Probate Court of Young County, Texas, including the order of sale, confirmation order and deed, and more especially the orders releasing the surety companies from all liability are valid and subsisting. This holding and final decision of the Court of Civil Appeals has forced the appellants to set up all of the above and foregoing questions, which were points of error in the lower courts. This ruling of the Court of Civil Appeals is in direct conflict and against all pre-existing law as cited and set up in the above and foregoing cases in the said questions, and is a direct violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

According to the law and statutes, all of the proceedings, orders and judgments of the Probate Court of Young County, Texas, including the order or orders releasing the said bonding companies are void and subject to collateral attack; *and*

the 4 years statute of limitation nor any other statute of limitation does not run against a void order.

> "A void judgment has been termed waste paper, an absolute nullity; and all acts performed under it are also nullities. Again, it has been said to be in law no judgment at all, having no force or effect, conferring no rights, and binding nobody. 'It is good nowhere and bad everywhere,' and neither lapse of time nor judicial action can impart validity. It is not susceptible of ratification or confirmation, and its invalidity may not be waived." *Commander v. Bryan, 123 S. W. 2d 1008 and 1015; 25 Tex. Jur., Sec. 254, p. 693.*
>
> "Nor will a void judgment be given effect of res adjudicata in a subsequent suit involving the same subject matter." *Ruby v. Davis, 277 S. W. 430.*
>
> "Due Process Clause in the Fifth and Fourteenth Amendments should be construed in the light of pre-existing law." *De Pauw University v. Brunk, 53 F. 2d 647, affirmed 52 S. Ct. 405, 285 U. S. 527, 76 L. Ed. 924.*

Furthermore, since plaintiffs or appellants have heretofore shown that the orders, judgments and proceedings of the Probate Court of Young County, Texas were all void, it renders the said American Surety Company liable on the said guardian's three notes all in the sum of $687.50 with interest added, on account of the defalcation of the guardian. It is held in *28 C. J. p. 1296, Sec. 4997:* "Estoppel * * * The guardian and the sureties are estopped to question the jurisdiction of the court, under the proceedings of which the guardian by the bond was enabled to obtain possession of the wards' money. After the sale of the wards' real property has been had, and the guardian has received the proceeds

thereof, the sureties on the special bond given as a prerequisite to the sale, are estopped to deny the validity of the guardian's appointment, or of the sale proceedings," and cases therein cited.

In addition, since the guardian was ordered to make a new bond on the 4th day of April, 1910, when the American Bonding Company of Baltimore asked the court to be released from the guardian's bond, and the guardian failed to make a new bond until August 16, 1913, and on August 1, 1913, the said guardian and wife executed a deed to the said J. M. Kirkland in consideration of $512.50, of that amount $112.50 represented cash, and $400.00 represented the value of two horses; that said guardian profited directly or indirectly from the sale of said land and horses in violation of said statute, and appropriated and converted the same to his own use and benefit, which rendered the said American Bonding Company of Baltimore liable to said appellants for said amount, while the said surety company was on the guardian's bond, before another surety qualified.

It is held in *Gann v. Kern, 249 S. W. 878 and 881, Texas:* "Both the principal and sureties on a guardian's bond are estopped to deny the recitals therein. A recital in a guardian's bond of his appointment estops both the guardian and the surety to deny it, and they cannot question the jurisdiction of the court, under the proceedings of which the guardian by the bond was enabled to obtain the possession of the ward's money. *Minchew v. Case, 143 S. W. 366, Tex. Court of Civil Appeals; Parker v. Campbell, 21 Texas 763, Sup. Court; Abilene State Bank v. United States Fidelity & Guaranty Co., 37 S. W. 2d 815 and 818,* holding

guardian and surety could not set up invalidity of guardianship proceedings.

"The sureties on a special bond given as a prerequisite to the sale are estopped to deny the validity either of the guardian's appointment or of the sale proceedings." *39 C. J., p. 371, Sec. 206*, and in cases therein cited.

QUESTION 7

Whether the suit on the surety companies' bonds as applied to the appellant was lost by limitation when the wards, failed to bring suit on the bonds within 4 years after they reached their majorities, but did bring suit on the bonds less than four years after the guardian died and before the guardianship closed, and an adverse ruling on same was violative of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

The Court of Civil Appeals held: The period during which the plaintiffs should have filed their suit therefor was within four years after they reached their respective majorities, the four-year statute of limitation being applicable. * * *

(continued on Page 20, Second Paragraph at top.)

"Giving the plaintiffs the benefit of every reasonable inference which properly could be drawn in favor of their petition, we believe that it is nevertheless conclusively shown that their cause of action against the bonding companies has been lost by limitation."

This suit was filed in the Probate Court of Young County, Texas, on the 25th day of February, 1955, in the nature of a bill of review in a direct attack to set aside the invalid and void orders in order to determine the liability of the pur-

chasers of the guardianship land, and in order to determine the liability of the defendant bonding companies herein, and the suit was brought in the District Court of Young County, Texas, on the 13th day of May, 1955, and was brought in both courts, less than four years after the death of the guardian and before he was discharged, and was brought in the latter court in the nature of trespass to try title, to recover on the land, purportedly conveyed by the guardian, as their interest might appear, and in the alternative on the bonds.

It is shown by the record that G. W. Birdwell was duly appointed and qualified as guardian of the estate of the wards, appellants, in Bell County, Texas, on August, 15th, 1906, after the wards were entitled to an estate from their grandfather. It was sworn to by the plaintiffs in their motion for summary judgment, which has not been controverted or denied that G. W. Birdwell, their father and guardian, died on the 17th day of June, 1951, insolvent, after having dissipated all of the money received out of the said wards' estate, from their grandfather. That while their father was guardian, he never did file an annual account, nor have an accounting with the wards, appellants, nor did he ever file a final account with the court, and was never discharged as guardian as long as he lived, and died on said date while he was still guardian. And as shown above, that suit was filed in both courts within less than four (4) years after the death of said guardian.

When a minor ward arrives at the age of 21 years, or a female ward marries, limitations do not start to run against

them, or each of them, for a recovery on the bonds, until the guardian is discharged. In the case at bar the guardian died on the 17th day of June, 1951, as shown by record, and according to law, that is when he was discharged, and the statute of limitations did not begin to run against the plaintiffs until that time, which is shown under *Article 5528 of the R. C. S. of Texas.* The Supreme Court of Texas held in the case of *Allen v. Stovall, 63 S. W. 863*, that:

> "Article 5528, provides that all suits on the bond of any guardian shall be commenced and prosecuted within four years next after the death, removal, resignation or discharge of such guardian, and not thereafter; and Article 4296 declares that when a minor ward arrives at the age of 21 years, or a female ward marries, the guardianship shall be immediately settled and the guardian discharged. Held, that, where a guardian has not been discharged, the fact that one of the wards married and another had become of age more than 4 years before instituting a suit for breach of the guardian's bond did not bar the action since the statute runs only from the guardian's discharge."

In *Whitfield v. Burrell, 118 S. W. 156*, holds by Article 5529, which defendants insist is applicable to these provisions, it is provided:

> "Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued, and not afterward. The 'every action' in this Article does not include nor mean the demand by the probate court of the guardian, as in these instant proceedings, for a final accounting of his transactions about the estate of his ward. * * * neither does it provide that where a guardian failed in his duty to file such account immediately

> upon the wards' arriving at the age of 21 years, the lapse of any given period of time thereafter furnished a bar to the enforcement of an accounting by the probate court * * *. We are of the opinion that neither the four nor the two years statute of limitation would apply in this case."

If a guardian dies, the statue is clear that limitation would run from that event * * *. *Marlow v. Lacy, Supreme Court of Texas, 2 S. W. 52; Ford v. Wheat, 36 S. W. 2d 712, Com. of App., adopted by Supreme Court; Massie v. De Shields, 62 S. W. 2d 322, writ refused,* further holds:

> "Where suit on guardianship bonds was commenced and prosecuted within statutory period, equitable plea of stale demand held not available (Art. 5528)." And further held: "four-year period for suit on guardianship bond held to commence running from date of probate court's order discharging guardian." *Martinez v. Guierrez's Heirs, 172 S. W. 766 and 770.*

Suit cannot be brought against the sureties on the guardian's bond until the guardian is discharged. "No suit on the bond of an administrator to make him and his sureties responsible for waste or misappropriation of assets can be maintained until after the administration is discharged." *Bain, et al. v. Coats, et al., Com. of App., 244 S. W. 130.* "Creditors may not recover on the bond of an executor or administrator for his failure to pay their claims while the administration is still pending," all of the above applies to guardians. *Wiren v. Nesbitt, 20 S. W. 128; 14 Tex. Jur., 438, Sec. 627.*

"By virtue of this statute (Art. 5528), limitation commences to run in favor of the obligors, not from the date

when the fiduciary relation ceases, but from the date when the court decrees that the guardian has resigned, been removed or discharged. In the event of the death of the guardian (as in our case at bar), however limitation runs from the date thereof." *21 Tex. Jur. p. 408, Sec. 130.*

Since the Court of Civil Appeals held that the plaintiffs' cause of action against the bonding companies has been lost by limitation, and that the period during which the plaintiffs should have filed their suit therefor was within four years after they reached their respective majorities, and the four-year statute of limitation being applicable, is in direct conflict with all pre-existing law, including common law and statutory law on the subject, and is in direct variance and in conflict with the Supreme Court case of *Allen v. Stovall, 63 S. W. 863*, and the Supreme Court case of *Marlow v. Lacy*, and the Supreme Court case of *Ford v. Wheat, 36 S. W. 2d 712*, and is in further conflict and variance with *Whitfield v. Burrell, 118 S. W. 156;* and *Massie v. Shields, 62 S. W. 2d 322*, and all other cases cited therein, and in all cases on the subject not cited herein. And in view of the above and foregoing, the appellants say that the same involves a substantial Federal Question, and is a violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, and further "Due process of law is essential to a valid judgment, and a void judgment confers no rights under the Due Process Clauses." *16A C. J. S. p. 835, Sec. 625; Twining v. New Jersey, 211 U. S. 78, 53 L. Ed. 97, 29 Sup. Ct. Rep. 14.*

QUESTION 8

Whether the two deeds in question were void, and the oil and gas mineral rights were severed from the land, give the appellants the right to acquire the said minerals thereunder and a decision adverse thereto is in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

The Court of Civil Appeals held among other things:

> "Grant of such 'unsevered' estates delivers the same to a grantee, whose adverse possession of the surface extends to and includes an adverse possession of the mineral interest thereunder which had never been separated or severed from the surface estate, and where such adverse possession sets the limitation statutes in motion to so effectively to mature title to the surface in a claimant, said statutes are likewise in motion so as to effectively to mature title to the unsevered mineral estate thereunder".

The appellants claim that there was a severance in this case and the law is not properly applied to the facts.

We find from the record that George W. Birdwell, guardian of said wards, plaintiffs, sold one-fifth (1/5) of 2496 acres of land inherited from their grandfather, Wilson Willingham, to William Willingham for the sum of $1,550.00 through the probate court of Bell County, Texas, on December 14, 1909, alleging that the same was sold for the support and maintenance of said wards (S. F. 33). On August 19, 1911, George W. Birdwell, took the sum of $1,100.00 in money and notes, and purchased the said 80 acres of land now in question, from Ed Watson and wife,

Jodia Watson, and took the said 80 acres of land in his own name in said deed; that he was holding the same in trust for his said minor wards, the appellants herein. That in the said Ed Watson deed to said guardian, there was a severance of the mineral interest, one-fourth (¼) of same was reserved in favor of the grantee, Ed Watson and wife, but it was actually belonging to the Belknap Coal Company, and three-fourths (¾) of said mineral interest, which included coal, gas and oil, was conveyed at said time to the said George W. Birdwell, who held it in trust for said wards, (S. F. 55), in the following words: "* * * Thence West * * * containing 80 acres of land, and an undivided one-fourth interest in all mineral rights in the above described land is hereby reserved, it being our intention to only convey to the said Birdwell an undivided three-fourths interest in the mineral rights to said land, which is to include coal, gas and oil, or any other minerals that may be found beneath the surface of said land". That said deed from Watson, et ux., to Birdwell is the common source of title.

That since we have shown heretofore that the deed executed by G. W. Birdwell and wife, Mollie Birdwell, to J. M. Kirkland, on August 1, 1913, was void without an order of the court authorizing same, wherein the notes were made payable to G. W. Birdwell, guardian of William and Lee Birdwell, minors, now Lee Green and William Birdwell, was void in violation of Art. 3553, which provides: "Except as hereinafter provided, no sale of any property of an estate shall be made without an order of court author-

izing the same * * *". In the case of *Loving v. Clark, 228 S. W. 590 and 593*, holds: "We think Article 3553, R. C. S. of 1925, Texas, providing that no sale of any property belonging to an estate shall be made by an executor or administrator without an order of the court authorizing the same, applies to guardianship. * * * It has been held in this state an administrator's sale, in the absence of an order of the probate court, authorizing the sale, is void, and may be attacked in a collateral proceeding"; *Kelly v. Neal, 111 S. W. 2d 1122; Gallemore v. Owen, 69 S. W. 2d 469.* Appellants have also shown that the attempted sale of the guardian, G. W. Birdwell, through the Probate Court of Young County, Texas, of the 80 acres of land in question, on the 20th day of October, 1913, was void and subject to collateral attack, wherein all of the proceedings were void which is shown in Question 1, through Question 6.

It is further shown that as a matter of record, Lee Birdwell, now since marriage, Lee Green, appellant, in February, 1914, was sixteen (16) years of age when she was married, and in February, 1919, she was 21 years of age, and William Birdwell, as a matter of record, was 21 years of age in the year 1925. The statute of limitations, being Article 5518 of the R. S. of 1925, does not run against minors or people under disability, who are entitled to sue for recovery of real property, and this includes married women under 21 years of age. And in *Huling v. Moore, 194 S. W. 188*, holds: "The statute of limitation to sue for the recovery of real property does not run against a married woman until she is 21 years of age."

And in further view of the fact that on November 6, 1918, the Belknap Coal Company partitioned this 80 acres of land, the mineral interest therein with J. M. Kirkland. In partitioning this mineral interest it was set off to J. M. Kirkland 30 acres out of the North portion of this 80 acre block or survey, and to the Belknap Coal Company 50 acres out of the South portion of said survey. (S. F. 104). Since when J. M. Kirkland took purported possession of said land from George W. Birdwell and wife, by deed dated August 1, 1913, and again under the purported guardian's deed of October 20, 1913, and the mineral interest as aforesaid, was partitioned on November 6, 1918, adverse possession or limitation could not run against the appellants herein during said time, for they were both minors, as shown before. Now in partition of their estate, we see that the Belknap Coal Company owned one-fourth of the 80 acres, and the wards, the appellants, owned three-fourths of same as shown in the Ed Watson and wife's deed to them, and that all were cotenants, and the partition was a severance of their mineral rights, for it is held in *Garza v. De Montalvo, 217 S. W. 2d 988 and 992, Sup. Ct. of Texas:*

> "As a matter of law it must be concluded that the partition agreement was intended to segregate and did segregate the mineral interest of the parties".

Since adverse possession or limitation never did start to run against said minors by J. M. Kirkland when the minerals were partitioned at said time in 1918, and the minerals were severed from the land in said partition deed from the land, and since there is no pleading or evidence that anybody has had dominion or possession of said min-

erals or drilled into or extracted them from the ground, it shows that the appellants are still entitled to them, since appellants have aready shown that the deed of August 1, 1913, and the guardian's deed of October 20, 1913 were void.

It is held in *31-A Tex. Jur. p. 43, Sec. 15:*

> "Adverse possession. After severance of the surface and the mineral estate, the possession of the one will not ripen into a limitation title of the other. So, after the severance of the oil and gas estate, adverse possession of the surface is not adverse possession of the minerals. When the adverse entry is made after the severance, something more than the use of the surface is required. Such dominion must be exercised over the minerals as well, which will be notice to the owner of the mineral estate that the possessor of the surface estate is claiming the minerals also".

It is held in *Watkins v. Certain-Teed Prod. Corp., 231 S. W. 2d 981:*

> "After the severance of the oil and gas estate, mere adverse possession and use of the surface does not constitute adverse possession of the minerals under the surface".

In addition, it is shown in *Stubbs v. Lowrey's Heirs, 253 S. W. 2d 312*, on March 12, 1925, R. A. Webb conveyed to N. A. Lowrey an undivided one-half of the minerals in and under a tract of land in Knox County, Texas. At the time of the execution and delivery of the above conveyance, there was an outstanding indebtedness against the land which was secured by a deed of trust. On February 5, 1935, a substitute trustee, acting under the powers granted in the deed of trust, sold said land to A. D. Bruce. Thereafter

Bruce conveyed the land to G. F. Stubbs. In this case the deed of trust lien ceased to exist four years after the maturity of the debt, at which time it was sold by said substitute trustee, and was therefore void. The court held:

> "The execution of the deed from Webb to Lowrey conveyed one-half of the minerals to the land constituted a severance as between the surface of the land and the minerals thereunder, and therefore, mere adverse possession and use of the surface does not constitute adverse possession and use of the minerals. * * *We hold the trustees' deed to Bruce did not convey title to the minerals and was void upon its face".

Furthermore, it is stated in *Campsey v. Jack County Oil and Gas Association, 328 S. W. 2d 912*, on or about the 30th day of March, 1936, a purported deed was executed by S. V. Stark purporting to act as trustee of the Jack County Oil and Gas Association, and which deed purported to convey to W. J. Cannon all of the oil, gas and other minerals which said association owned in a certain described tract of land, and that the defendant, Lon Campsey, is claiming under said deed. The court found the said trustee, S. V. Stark, never had authority to convey said land for the association, and therefore the deed was void. The defendant in that case contended that since he and his predecessors have been in peaceable and adverse possession of the land, using same for all adaptable purposes, openly and adversely, for more than ten years, the plaintiff is barred by the three, four, five and ten year statutes of limitations, which is the same thing the defendants are contending for in the case at bar before us. But the defendants in that case never did allege and prove that they had ad-

verse possession and ominion over the minerals, the same as this case of the appellants herein. The court held:

> "The evidence does not show that any oil, gas or other minerals have ever been produced on the land, or that any, or any wells have been drilled thereon. Under the record before us, we must apply the rule that where there has been a severance of the minerals and mere possession of the surface is not such possession of the minerals as to perfect limitation title. Such dominion must be exercised over the minerals as will constitute notice to the owner of the mineral estate that the possessor of the surface is claiming the minerals also".

In the way of a summary under this quesetion, we see that the deed of August 1, 1913, executed by the guardian and wife, was void, and the deed executed by the guardian by order of the probate court on October 20, 1913, was also void, and the partition deed executed on November 6, 1918, by Belknap Coal Company, cotenants with appellants, which was partitioned with J. M. Kirkland, and which severed the mineral rights, and all deeds were executed herein while appellants were under 21 years of age before adverse possession could start on the surface of the land, and since there was no adverse possession and dominion over the minerals, the appellants as a matter of right are entitled to their portion of the mineral rights of three-fourths (¾) of the said 80 acres of land; and there should be an equitable partition of the same.

In addition, under the equitable partition doctrine, the Belknap Coal Company's interest should be set off in the North portion of said 80-acre tract, (S. F. 104), in favor

of J. M. Kirkland, heirs and assigns in the amount of 20 acres, it being their interest of one-fourth of the mineral rights, which the Belknap Coal Company conveyed to Kirkland. Said company would be estopped to deny making said conveyance or partition. The other 50 acres in the South part of said land should be adjudged in favor of the appellants herein since according to record there is no producing well or wells on said land, and it all appears to be equal in value over the entire tract; and that the 10 acres within the North portion of said tract with J. M. Kirkland, heirs and assigns, should be adjudged in favor of the appellants, thereby making the appellants having 10 acres of undivided interest with said J. M. Kirkland, and they would be therefore tenants in common as to said mineral rights in the said 20 acres of land. That plaintiffs acquiesce in and ratify that kind of adjudication if permitted by the court under the equitable partition doctrine. *Arnold v. Cauble, 49 Tex. 527.*

It is held in *Maverick v. Burney, 32 S. W. 512:*

> "In many jurisdictions that the deed of a tenant in common to a specific parcel of land held in common by him with others is absolutely void. But it is settled in this court by a long line of decisions that such a deed is good as between the parties, and is voidable only by the cotenants of the grantor, and not by them except insofar as it may affect their rights." *Thomas v. Southwestern Settlement and Development Company, 123 S. W. 2d 290;* and if necessary the appellants have the right to repartition their mineral interests.
>
> "Cotenants not joined in voluntary partition of land can sue to set aside the partition and for a repartition

in an action in which all of the allotments and all of the allottees and those holding under them are brought before the court". *Joyner v. Christian, 113 S. W. 2d 1229; Lasater v. Ramirez, Com. App., 212 S. W. 935.*

In the alternative, if the appellants are mistaken in the fact that when the said partition deed was made on November 6, 1918, while the appellants were minors, that it was not a severance, then the appellees are still liable for excluding the appellants from the partition deed, who did not know of their interest and did not acquiesce in the adverse possession, if there was any, and knowledge cannot be imputed to sustain acquiescence.

The appellants swore in their suporting affidavit for summary judgment, (Tr. 55), the affiants further say that during the lifetime of their father that there existed a relationship of trust and confidence between them, and they placed utmost confidence in him as long as he lived; that the affiants were ignorant of the existence of their causes of action up until their father's death, and up until about the time they filed suit, and when they took the deposition of J. M. Kirkland (on the 18th day of March, 1955) and later. They further swore, (Tr. 59), that the plaintiffs, and each of them, were illiterate, had no education * * *. They had very little, if any, business experience. After the latter part of October, 1913, plaintiffs left and moved away from Young County, Texas, and traveled for several years with their father in a wagon; and were not accessible to the county records, and they never lived in

Young County, Texas, again. That plaintiff, Lee Green, married on or about the 9th day of February, 1914, and her husband took care of her from said time. That the affidavits herein supporting their summary judgment were not controverted or denied by the appellees, or either of them.

It is held in *Scoggins v. Lee, 92 S. W. 2d 1116:*

> "Where heirs partitioned land excluding one heir, who did not know of his interest, excluded heir remained a tenant in common, since knowledge is necessary to acquiescence, and court will not impute knowledge to sustain acquiescence."

The court further held:

> "It is not contended by any one the appellee had any actual knowledge of the partition of the land in controversy between the heirs in 1912. The evidence affirmatively shows that he never came back to Texas after leaving in 1907, until a short time before filing of this suit in the court below. The evidence also affirmatively shows that he knew nothing of the property or his interest therein until a short time before the filing of this suit. It follows, then, that knowledge of appellants Scoggins' holding must in some manner be brought home to Lee, appellee. * * * In Stephens v. House, 248 S. W. 30, 33, the Commission of Appeals, in discussing the doctrine of acquiesence relating to the presumption of a deed, says: 'Knowledge being held necessary to establish acquiescence, we are not willing to extend the doctrine to those cases where it is necessary to impute knowledge to sustain acquisence. * * * But in this case, where the parties do not reside in the neighborhood of the land, and where they know nothing of it, residing in another county, and there being not even a scintilla of evidence that their ances-

tors had any knowledge of the claim, knowledge should not be imputed to them of the adverse claim'."

Ignorance of the Existence of Cause of Action

"Generally speaking, and in the absence of fraud, a plaintiff's ignorance or inability to learn of his cause of action will not prevent the statute of limitation from running * * *. 'An exception to this rule is sometimes applied where there has been a relation of trust and confidence between the parties'." *28 Tex. Jur. 144 and 145, Sec. 61.*

In *State v. Jones, 315 S. W. 2d 433 and 436*, the court held:

"'Ordinarily a person's ignorance of his cause of action will not prevent the statute of limitations from running. But there are exceptions to the rule. One of the recognized exceptions arises where there has been a relation of trust and confidence between the parties, as sometimes arises in matters pertaining to principals and agents, or trustees', and cases therein cited.

"For another example: 'Where, pursuant to a contract between an attorney and a bank, the attorney was entitled to ten per cent of a judgment recovered, a trust relationship existed between the parties, and limitation did not run against the attorney's cause of action until he learned that the bank breached the trust by collecting the judgment and failing to account'." *Cobb v. National Bank of Decatur, Supreme Court of Texas, 42 S. W. 770.*

Since the ruling and decision of the Court of Civil Appeals is in conflict and at variance with the above decisions, it is in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

QUESTION 9

Whether appellants' motion for summary judgment, supported by their affidavits, depositions, pleadings and records in the case, which showed no genuine issue of fact to be determined, and which motion was not controverted by the affidavits of the defendants, appellees, and a decision adverse to same is in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

The plaintiffs, in their motion for a summary judgment, seek to recover upon their claim as pleaded in their second amended original petition in trespass to try title, and in their first amended supplemental petition, and in their supporting affidavits and depositions. The pleadings, depositions on file, together with such supporting affidavits and records show that, * * * there is no genuine issue to any material fact, and that these plaintiffs, the moving parties, are entitled to a judgment for full recovery upon such claim against said defendants, as a matter of law.

That in view of the fact that the affidavits to summary judgment, (Tr. 53-59), with reference to the bonding companies and all of the appellees hereir, is made out in full against them, and since neither the said surety companies nor any of the appellees have set up any counter-affidavits to said motion, nor contested the same, as a matter of law, the plaintiffs have a right of recovery against them, since there is no genuine issue of fact to be determined; and that the said affidavit sets up all of the facts and cause of action

to be determined herein, which reference is hereby made, without setting out the same herein.

The defendants at the hearing filed no counter-affidavits, and made no showing that affidavits were available; summary judgment should be granted as a matter of law. In the case of *Rolfe v. Swearingen, 241 S. W. 2d 236*, the court held:

> "Where plaintiffs, at hearing on defendants' motion for summary judgment, filed no counter-affidavits, and made no showing that affidavits were available, they, in effect, admitted facts alleged in defendants' sworn affidavits supporting motion, and summary judgment was properly granted".

The defendant, A. B. Larrimore, herein, filed a sworn answer, setting up various pleas of limitation in resistance to the plaintiffs' motion for a summary judgment it did not amount to a counter-affidavit,. (Tr. 88). In the case of *Be son v. Harrell, 324 S. W. 2d 620*, the court held:

> "Sworn answer filed by plaintiffs in resistance of defendants' motion for summary judgment did not amount to a counter-affidavit".

Appellants ask the court when and if they grant them a hearing herein, that the court sustain the above and foregoing questions and issues in favor of appellants and give them title and possession of said land and three-fourths of its minerals as their interest might appear under their points, questions and pleadings, and summary judgment, in the alternative, appellants ask the court to render them a decision on the bonds as heretofore shown.

CONCLUSION

The appellants have tried to show the court and cite cases to sustain the jurisdiction and to include the reasons why the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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PROOF OF SERVICE

I, Sidney E. Dawson, one of the attorneys for William Birdwell and Lee Green, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of April, 1961, I served copies of the foregoing Statement of Jurisdiction to the Supreme Court of the United States on the several parties thereto, as follows:

On J. M. Kirkland, et al., and American Bonding Company of Baltimore, et al., Appellees, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 16104

WILLIAM BIRDWELL, ET AL, *Appellants,*

vs.

J. M. KIRKLAND, ET AL, *Appellees.*

WILLIAM BIRDWELL, ET AL, *Appellants,*

vs.

AMERICAN BONDING COMPANY OF BALTIMORE, ET AL, *Appellees.*

Appealed from the Court of Civil Appeals of Texas for the Second Supreme Judicial District at Fort Worth

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 16104

WILLIAM BIRDWELL, ET AL, *Appellants,*

vs.

J. M. KIRKLAND, ET AL, *Appellees.*

WILLIAM BIRDWELL, ET AL, *Appellants,*

vs.

AMERICAN BONDING COMPANY OF BALTIMORE, ET AL, *Appellees.*

Appealed from the Court of Civil Appeals of Texas for the Second Supreme Judicial District at Fort Worth

APPELLEES' BRIEF

This is a frivolous appeal. The facts out of which these cases arose are summarized at length in the opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, reported in 337 S.W. 2d 120 (1960). Briefly stated, Appellants contend that in 1913 their father, G. W. Birdwell, as guardian, sold real estate belonging to their estate, for which he was to receive a down payment of $400.00 cash, but for which he instead accepted two horses, a mare named Ann and a stallion, and that their father never accounted to them for the money which he re-

ceived, or should have received, for the sale of the land. Appellants' father died in 1951. These cases were filed in 1955, thirty-seven years after Appellant Lee Birdwell Green attained age twenty-one, and thirty-one years after William Birdwell attained age twenty-one. In these suits Appellants seek to recover title to the land sold by their guardian in 1913 and also to recover from the sureties on certain guardian's bonds filed by G. W. Birdwell for alleged defalcations by the guardian.

The sureties, American Bonding Company of Baltimore and American Surety Company of New York, filed motions for summary judgment in the District Court of Young County, Texas, which were sustained. The other Appellees filed special exceptions and pleas in abatement, which were also sustained by the Trial Court. On appeal the Court of Civil Appeals affirmed the judgment of the Trial Court for the bonding companies, but reversed the judgment in favor of the other Appellees, remanding the case to the Trial Court for trial on the merits as to those Appellees.

WANT OF JURISDICTION

The Supreme Court of the United States lacks jurisdiction in this case for want of a federal question of substantial character.

Appellants cite Section 1257(2) of Title 28 of the United States Code as the source of jurisdiction of the Supreme Court of the United States in this case. The state statutes, the validity of which they allege

is involved, are Articles 4291 and 5528 of Vernon's Civil Statutes of Texas (1925), and Article 1853 of the Texas Revised Civil Statutes of 1895.

Nowhere in the record will be found any attack by Appellants upon the constitutionality or validity of any of the state statutes cited above. As a matter of fact, Appellants, rather than attacking the validity of the cited statutes, have actually relied upon them, necessarily recognizing their validity. What Appellants are really complaining about is the failure of the appellate courts of Texas to apply the statutes in the manner urged by Appellants.

The general rule is that misconstruction of a valid state statute by the highest court of the state does not give the Supreme Court of the United Staes jurisdiction. *Nebett vs. Carpenter*, Cal., 59 S. Ct. 170, 305 U.S. 297, 83 L. Ed. 182, rehearing denied 59 S. Ct. 355, 305 U.S. 675, 83 L. Ed. 437; *Morehead vs. People of State of New York ex rel. Tipaldo, N.Y.*, 56 S. Ct. 918, 298 U.S. 587, 80 L. Ed. 1347, 103 A.L.R. 1445, rehearing denied 57 S. Ct. 4, 299 U.S. 619, 81 L. Ed. 456; *Hebert vs. State of Louisiana*, La., 47 S. Ct. 103, 272 U.S. 312, 71 L. Ed. 270, 48 A.L.R. 1102.

Appellees recognize that a state statute may be so construed as to render it repugnant to the Federal Constitution. However, that result is not presented in this case. Articles 4291 and 1853, relied on by Appellants, involve purely procedural matters in removing a guardianship proceeding from one Texas county to another. Appellants are attacking the validity of certain actions of the guardian for alleged non-

compliance with those statutes. The state courts have held that there is no proof of noncompliance with these statutes such as to render void the orders and proceedings of the probate court which were a matter of record for some forty-two years before the filing of these suits.

Neither is there any attack in these cases upon the validity of Article 5528, which proscribes the limitation period within which suit may be brought against the sureties on a guardian's bond. The effect of the state court decision is simply that the statute was inapplicable, but that under another limitation statute, Article 5529, Vernon's Civil Statutes of Texas, Appellants' alleged cause of action was barred long before these suits were filed.

THE STATE COURT DECISION IS CORRECT

This case involves nothing but Texas law and, insofar as it pertains to the matters complained of by Appellants, was properly decided. Insofar as the bonding companies are concerned, the cases also involve the proper application of Rule 166-A of the Texas Rules of Civil Procedure, pertaining to summary judgment.

Since the absence of any federal question is clearly demonstrated, it is thought that this Honorable Court will probably not be keenly interested in the merits of the decision of the state court from the standpoint of state law. However, in order that the Court might know the basis of that decision with regard to the bonding companies, there is copied in the Appendix

of this Brief that portion of the bonding companies' brief filed in the Supreme Court of Texas dealing with the merits of the controversy.

The only "question" presented by Appellants which affects any of the Appellees other than the bonding companies is number 8 concerning whether there has been a severance of the surface and mineral estates of the land in question. It is difficult to imagine a question more exclusively involving state law. This is apparent from the fact that in their discussion of the question Appellants cite only state court decisions.

If the Supreme Court of the United States has jurisdiction in this case, and chooses to exercise it, it is difficult to conceive of any kind of case which might be filed in the state courts, from the Justice Court on up, with which this highest court in the land might not be ultimately burdened. Appellees are inclined to think that there are cases demanding the attention of the Court with issues of greater public importance than whether Appellants were wronged forty-eight years ago when their father and guardian accepted a stallion and a mare named Ann in lieu of $400.00 cash.

CONCLUSION

Appellants' appeal (or petition for certiorari) hould be dismissed for want of jurisdiction; or, al-rnatively, same should be denied.

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CERTIFICATE OF SERVICE

I, G. D. Hinson, one of the attorneys for Appellees and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of May, 1961, I served copies of the foregoing brief on the following attorneys of record for Appellants:

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APPENDIX

Portion of Brief of American Bonding Company of Baltimore and American Surety Company of New York filed in the Supreme Court of Texas

FIRST COUNTERPOINT

(Restated)

The Trial Court correctly held that Petitioners' alleged cause of action against Respondent American Surety Company of New York constitutes a collateral attack upon the order of the County Court of Young County, Texas, entered on the 15th day of July, 1915, releasing and discharging said Respondent as surety upon the guardian's bond.

SECOND COUNTERPOINT

(Restated)

The Trial Court correctly held that Petitioners' alleged cause of action against Respondent American Bonding Company of Baltimore constitutes a collateral attack upon the order entered by the County Court of Bell County, Texas, on the 4th day of April, 1910, releasing and discharging said Respondent from further liability as surety on the guardian's bond.

THIRD COUNTERPOINT

(Restated)

The Trial Court correctly held that Petitioners' alleged cause of action is barred by the four year statute of limitation, Article 5529.

FOURTH COUNTERPOINT

(Restated)

The Trial Court correctly held that Petitioners have been guilty of laches.

STATEMENT

G. W. Birdwell, father of Petitioners, made application for letters of guardianship and was appointed guardian of the estates of Petitioners, who were then minors, in the County Court of Bell County, Texas, in 1906 (Tr. 8-10). In the order appointing him he was required to give bond in the sum of Three Thousand Dollars ($3,000) (Tr. 10), which he did on August 23, 1906, when he filed a guardian's bond with two personal sureties (Tr. 12). On September 22, 1909, G. W. Birdwell, as guardian, and American Bonding Company of Baltimore, as surety, executed a guardian's bond in the sum of Three Thousand Dollars ($3,000) which was approved by the County Court of Bell County on October 9, 1909 (Tr. 14).

On March 5, 1910, American Bonding Company of Baltimore made application to be discharged from liability for the future acts of the guardian (Tr. 23). On April 4, 1910, the County Court of Bell County granted such application and ordered the guardian to file a new bond (Tr. 24).

On August 10, 1913, after the guardianship had been transferred to Young County, the guardian filed a general guardian's bond in the sum of Twenty-Five Hundred Dollars ($2500) with the American Surety Company of New York, as surety, which was, on that

date, approved by the County Judge of Young County, Texas (S.F. 48). On February 25, 1915, Respondent American Surety Company of New York sent a petition to the County Clerk of Young County asking that it be released as surety on the guardian's bond (S.F. 52, 53). On July 13, 1915, the County Court of Young County entered an order granting petition of American Surety Company and discharging it from any further liability on said guardian's bond (S.F. 53, 54).

In their amended petition in Cause No. 18,486 (on appeal from Cause No. 436 in the County Court of Young County) Petitioners pray that the orders discharging Respondents from liability as sureties on the guardian's bonds be set aside, and that Respondents be held liable to Petitioners for alleged misappropriations by the guardian (Tr. 23, Second Part). The same relief is sought in Cause No. 13,313, filed as an original suit in the District Court of Young County (Tr. 35).

In both cases Respondents plead that Petitioners' alleged causes of action constitute collateral attacks upon the orders of the Probate Court discharging Respondents as sureties on the guardian's bonds, and Respondents also plead the four year statute of limitations, Article 5529, and laches (Tr. 72 and 77; Tr., Second Part, 60 and 94).

On June 4, 1959, District Court of Young County, Honorable Arthur Tipps presiding, held a pre-trial hearing in this cause with ". . . all parties agreeing in open court that all of the special exceptions, limitation pleas, and other dilatory matters, and all mo-

tions for summary judgment of defendants American Bonding Company of Baltimore and American Surety Company of New York on file herein should be presented and were presented to the court (Tr. 66). Pursuant to such hearing the court entered judgment sustaining the special exceptions, limitation pleas, motions for summary judgment of all of the defendants, including the Respondents, and ordered the Petitioners' alleged causes of action dismissed at Petitioners' cost (Tr. 66 and Tr. Second Part, 40).

ARGUMENT AND AUTHORITIES

Petitioners contend that under Article 5528 they had four years from the date of their father's death within which to file suit against these Respondents as sureties on their respective guardian's bonds. However, they completely overlooked the fact that orders were entered in 1910 and in 1915 discharging these sureties from liability under their respective bonds, and those orders, unless and until set aside by appropriate action brought for that purpose, bar any recovery by Petitioners.

The proper remedy by which to attack the orders is by bill of review. 25 *Tex. Jur.* 585, Judgments, Sec. 185. It is well settled that the four year statute of limitation, Article 5529, applies to bills of review. *Parmley vs. Parmley* (Civ. App. 1941) 149 S.W. 2d 647, err. ref.; *Morse vs. Morse* (Civ. App. 1942) 162 S.W. 2d 1023, err. ref. Each of those cases involves a bill of review to set aside certain guardianship proceedings. In each instance the court held that the four

year statute of limitation applied, and that it commenced to run when the wards attained the age of twenty-one (21) years or married prior to that date. In the instant case Petitioner Lee Birdwell Green attained the age of twenty-one (21) in 1918, and Petitioner William Birdwell attained the age of twenty-one (21) in 1924.

Petitioners allege, but do not prove, that the order discharging American Surety Company from further liability is erroneous because the guardian never filed a new bond. There is no proof in the record that a new bond was not filed as ordered, but even assuming that to be the case, the fact remains that the order entered by the County Court of Young County, Texas, on July 15, 1915, discharging American Surety Company from further liability is not void, even if voidable. If the order is voidable, then it may be set aside only by bill of review commenced prior to the running of the limitation statute. A case directly in point is *Miller vs. Miller* (Civ. App. 1899) 53 S.W. 362, err. ref., in which the court held:

> "The judgment of the probate court discharging the sureties on the guardian's bond being erroneous, the plaintiffs were entitled to have it corrected by bill of review . . ." (Page 364)

In the case of *Moore vs. Hanscom* (Sup. Ct. 1908) 106 S.W. 876 an order discharging a surety (American Surety Company) was under attack. The court held that such an order is not subject to collateral attack, and that the burden was upon the parties

attacking the order to show the lack of jurisdictional facts rendering the order void.

The Court of Civil Appeals held that the trial court propery granted these Respondents' motions for summary judgment inasmuch as Petitioners failed to counter such motions with any evidence sufficient to toll the four year statute of limitation, Article 5529. It was equally proper for the trial court to sustain Respondents' special exceptions based on the four year statute of limitation. In other words, Petitioners' pleadings show on their face that their cause of action, as against these Respondents, as sureties on their respective guardian's bonds, is barred by limitation. In that connection it is pointed out that these Respondents are not involved in the trespass to try title action, as to which the Court of Civil Appeals has held that Petitioners' pleadings do not show on their face that such action is barred by the various statutes of limitation. Without intending to comment one way or the other on such holding, these Respondents would direct the court's attention to the fact that in the trespass to try title action, the limitation statutes dealing with adverse possession are involved, while in the action against these Respondents an entirely different statute of limitation, Article 5529, is applicable.

Petitioners' pleadings of fraud, concealment and the like on the part of the guardian, their father, whether or not relevant for any other purpose, have no pertinence to the application of the four year statute of limitation. There was no concealment of the nature or extent of the property which came under the control

and possession of the guardian. All of that is a matter of record. If the guardian never accounted to Petitioners for any of such property, upon their attaining majority, then that fact must necessarily have been known to Petitioners. If, on the other hand, they contend that they were ignorant of that fact that they were entitled to receive any property from the guardian, then they are confronted with the obvious fact that this information could have been gained by examining the probate records of Bell and Young Counties. This is virtually admitted by Petitioners on page 45 of their brief where it is stated "that after an examination of the record by their attorney, and after an examination of the probate records of Bell County, Texas, the said attorney was enabled to discover the invalidity of the title, and immediately filed this suit in this cause of action, Tr. 31, and on the 25th day of February, 1955". If such information could be obtained from the records of Bell County in 1955, why was it not equally available for the previous thirty years, during all of which time both of Petitioners were of legal age.

More precisely, the question here involved is not whether the guardian's alleged defalcation of his wards' property and funds was concealed, but whether there was any fraudulent concealment of the orders of the probate courts of Bell and Young Counties discharging these Respondents as sureties on the respective guardian's bonds. Unless and until those orders are set aside, the question of the guardian's alleged misappropriations is not even reached. Since those orders have been a matter of record since 1910 and 1915, respectively, it is apparent that Petitioners' fail-

ure to take action to set them aside was occasioned, not by any fraud or concealment, but by Petitioners' utter lack of diligence.

Since Petitioners' pleadings show upon their face that their action to set aside the orders of the probate courts discharging these sureties is barred by limitation, the trial court properly sustained Respondents' special exceptions, as well as their motions for summary judgment, all of which were considered together by agreement of the parties (Tr. 66).

FIFTH COUNTERPOINT

(Restated)

The Trial Court correctly held that there was no liability on the part of Respondents, each of whom was surety on a general guardian's bond, for alleged misappropriation by the guardian of proceeds from the sale of real estate.

STATEMENT

The bond on which American Bonding Company of Baltimore is surety is a general guardian's bond, unrelated to the sale of real estate (S.F. 23). The same is true of the bond on which the American Surety Company of New York is surety (S.F. 47, 48). In the trial court Petitioners contended that the latter bond was a guardian's sale bond rather than a general bond, but such is clearly not the case. At that time there was in effect a statute (now Article 4201) which provided that the order of sale of real estate should require the guardian to file a good and sufficient bond

subject to the approval of the court in an amount equal to twice the amount for which the real estate is sold. The guardian filed an *application* for the sale of real estate in the County Court of Young County on August 27, 1913 (S.F. 47), eleven (11) days *after* the guardian's bond with American Surety Company as surety was filed and approved. An *order of sale* was not entered until October 13, 1914 (S.F. 49), almost two months after the bond was approved. The real estate in question was sold for Two Thousand Dollars ($2,000), which means that a guardian's sale bond would have had to be in at least the amount of Four Thousand Dolars ($4,000).

Petitioners' alleged cause of action against Respondents is based upon the alleged misappropriation by the guardian of the proceeds of sale of the real estate in Young County. In their answers and motions for summary judgment Respondents plead, in their defense, that, as sureties of the guardian's general bond, they were not liable for the alleged misappropriation of the proceeds of the real estate sale (Tr. 72, 77 and Tr., Second Part, 60 and 94). These contentions were sustained by the trial court.

ARGUMENT AND AUTHORITIES

It is well settled that, prior to the adoption of the new Texas Probate Code, the sale of real estate was not one of the general duties of a guardian, and that the sureties on his general bond are not liable for derelictions in respect to such sale. 21 *Tex. Jur.* 351, Guardian and Ward, Sec. 374. In *American Indemnity Company vs. Noble* (Com. App. 1921) 235

S.W. 867, the Commission of Appeals, in an opinion by the Supreme Court, held:

> ". . . The duty to sell being distinct from the general duties, the surety on the general bond only assumed the responsibility for the breach of the general duties by the guardian, and is not liable for his failure to give a special bond or to account for the proceeds of the sale of real estate." (Page 868, 869)

The case of *American Indemnity Company vs. Noble* has been cited and followed many times. *Jarnagin vs. Garrett* (Civ. App. 1954) 69 S.W. 2d 511, err. ref.; *American Indemnity Company vs. Padgett* (Civ. App. 1940) 136 S.W. 2d 254.

Since Respondents were only sureties on general bonds, they are not liable for the alleged misappropriations of the proceeds of the sale of real estate, even assuming that such occurred.

SIXTH COUNTERPOINT

(Restated)

The Trial Court correctly held that Petitioners did not allege a cause of action against Respondents in that Petitioners' pleadings show, upon their face, that the alleged misapplication of funds, if any, by the guardian did not occur while the bonds upon which Respondents were sureties were in effect.

STATEMENT

Petitioners seek to recover from Respondents for alleged misappropriation of funds realized from the

sale of land belonging to the wards. Such sale was made and confirmed by the probate court on October 20, 1913 (S.F. 51).

As stated under previous statements, the American Bonding Company was discharged from further liability on its bond by order of the County Court of Bell County on February 8, 1910 (S.F. 38). American Surety Company was discharged from further liability on its bond by order of the County Court of Young County entered on the 13th day of July, 1915 (S.F. 53). Neither of such orders has ever been set aside.

ARGUMENT AND AUTHORITIES

If the guardian misappropriated any funds realized from the sale of real estate belonging to the wards, it must have occurred after October 20, 1913, when the guardian's sale was confirmed. Therefore, under no circumstances could there be any liability on the part of American Bonding Company, which was discharged from any further liability on April 4, 1910. Neither could there be any liability on the part of American Surety Company, even assuming that its bond was a sale bond rather than a general bond, unless the defalcations occurred prior to July 13, 1915, at which time an order was entered discharging said Respondent from further liability on its bond.

In their pleadings Petitioners do not allege, nor did they undertake to prove, that the alleged misappropriations occurred prior to July 13, 1915.

It is held that:

> "The liability on a bond commences with the assumption of duties by a guardian and the execution of the instrument by the sureties. It continues until exoneration of the principal, either by a discharge or by a valid release, or exoneration of the sureties by the giving of a new bond and the issuance of an order releasing them." 21 Tex. Jur. 352, Guardian and Ward, Sec. 375.

The burden was upon Petitioners to allege and prove that the alleged misappropriations occurred while the guardian's bonds were in effect and before the sureties were discharged from liability. Petitioners failed completely to discharge this burden.

SEVENTH COUNTERPOINT

(Restated)

The Trial Court correctly sustained Respondents' plea to the jurisdiction in Cause No. 13,468, on appeal from Cause No. 436 in the County Court of Young County, Texas.

STATEMENT

Cause No. 13,468 is on appeal from the original guardianship proceedings, being Probate Cause No. 436 in the County Court of Young County, Texas. Respondents filed their plea to the jurisdiction of the County Court based upon two grounds: (1) That Petitioners sought recovery against Respondents in excess of One Thousand Dollars ($1,000), and therefore in excess of the jurisdictional limit of the County

Court; and (2) That the case was filed and docketed as a probate matter, and since Petitioners' alleged cause of action was actually in the nature of a civil action, the County Court, sitting as probate court, was without jurisdiction (Tr. 60). Such plea to the jurisdiction was sustained by the County Court (Tr., Second Part, 92) and also by the District Court (Tr., Second Part, 92 and 40).

ARGUMENT AND AUTHORITIES

The jurisdiction of the County Court in civil matters is limited to cases wherein the matter in controversy is under One Thousand Dollars ($1,000), exclusive of interest. Article 1950. Since Petitioners seek judgment against Respondents in excess of that amount, the County Court was clearly without jurisdiction.

It is also well established that a suit against surety on a guardian's bond is in the nature of a civil action, and does not come within the jurisdiction of the probate court. 21 *Tex. Jur.* 357, Guardian and Ward, Sec. 378. In fact, former statutes which attempted to confer jurisdiction on the probate court to render judgment on the guardian's bonds were held unconstitutional, *Ibid; Timmins vs. Bonner and Long* (Sup. Ct. 1883) 58 Tex. 554.

Since this case is on appeal from the probate court, the jurisdiction of the District Court was limited to matters which were properly before the probate court. 21 *Tex. Jur.* 332, Guardian and Ward, Sec. 358.

Petitioners will perhaps contend that the action they

filed in the probate court was not a civil action on the guardian's bonds, but merely an action for a final accounting with the guardian. Obviously, such is not the case. When the guardian died the probate court lost control over the guardianship, which was thereby terminated. The guardianship having terminated, the probate court was without authority either to render a decree against the former guardian or to settle his account and dismiss his sureties. 21 *Tex. Jur.* 358, Guardian and Ward, See. 379; *American Bonding Company of Baltimore vs. Logan* (Civ. App. 1910) 132 S.W. 2d 894.

The courts below properly held that in probate matter No. 436 in the County Court of Young County, appealed to the District Court in Cause No. 13,468, said courts were without jurisdiction to enter judgment against Respondents as sureties on the guardian's bond or to have an accounting between Petitioners and their guardian, who died prior to the time this action was instituted.

EIGHTH COUNTERPOINT

(Restated)

The Trial Court correctly held that the guardian was authorized, by proper order of the probate court, to use the guardianship funds for the education, support and maintenance of Petitioners during their minority.

STATEMENT

Letters of guardianship were granted to G. W. Birdwell in 1906 in the County of Bell County (S.F. 8)

The inventory and appraisement filed by the guardian and approved by the court shows the wards to own an undivided 1/5 interest in some land, the appraised value of their interest being Thirteen Hundred Seventy-five Dollars ($1,375), and an undivided 1/5 interest in some personal property, the appraised value of their interest being Eighty-Five Dollars ($85) (S.F. 10, 11). Soon after his appointment the guardian, in October, 1906, made application to sell the real estate, alleging that it was necessary for the education and maintenance of the wards (S.F. 14). Apparently, no action was taken on the original application, so the guardian again made application to sell the real estate in 1909, again alleging that it was necessary to sell the same for their education and maintenance, and "That your petitioner is the sole surviving parent of said minors, and through financial losses and ill health is unable to properly maintain and educate the said minors without using a portion of the estate of said minors for that purpose" (S.F. 19). The County Court of Bell County found that it was necessary to sell the land for the support and maintenance of said minors (S.F. 29, 30). The real estate was sold for Fifteen Hundred Fifty Dollars ($1,550), of which Four Hundred Dollars ($400) was paid in cash (S.F. 34). Immediately thereafter the guardian made application for an allowance stating that the minors had no assets except the proceeds of the land which was sold, and that the guardian was not financially able to support, educate and maintain said minors (S.F. 35). Such application was granted and the guardian was granted an allowance of One Hundred Dollars ($100) per year

for each of said minors for their education, support and maintenance, such order being entered the 10th day of January, 1910, (S.F. 36).

ARGUMENT AND AUTHORITIES

The record conclusively shows Petitioners' father, as guardian, not only had authority to use the funds which came into his hands as guardian, but that it was necessary for him to do so in order to support and maintain Petitioners during their minority. The record shows that Petitioners' father was in ill health and not financially able to support Petitioners without invading the assets of the guardianship. This he did with full approval by and under order of the probate court. Therefore, aside from the other defenses available to Respondents, it appears conclusively from the records that, *on the merits*, Petitioners could not prevail against Respondents.

The application for guardianship shows that Lee Birdwell Green was nine (9) years of age and William Birdwell was three (3) years of age in 1906. Therefore, when the allowance of One Hundred Dollars ($100) per year per ward was entered in 1910 the Wards were thirteen (13) and seven (7) years of age respectively. It is obvious, therefore, that by the time both wards attained majority, or married, the guardian was authorized by order of the court to use far more than the Fifteen Hundred Dollars ($1,500) realized from the sale of real estate.

If Petitioners realy thought that their father defrauded them, why did they wait more than thirty

(30) years after they attained majority, and after their father died, before filing these suits? Obviously, it was their purpose to wait until death sealed his lips. The records still speak, however, and they show that Petitioners' father, in the face of ill health and financial woes, struggled to provide for them, as any father should. Rather than a defrauder, he was their benefactor.

PRAYER

WHEREFORE, these Respondents pray that the judgment of the Trial Court be in all things affirmed.

Respectively submitted,

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BY: _____
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JUN 5 19[illegible]

JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

No. 16104

WILLIAM BIRDWELL, *et al.*,

Appellants,

v.

J. M. KIRKLAND, *et al.*,

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WILLIAM BIRDWELL, *et al.*,

Appellants,

v.

AMERICAN BONDING COMPANY OF BALTIMORE, *et al.*,

Appellees.

Appeals from the Court of Civil Appeals of Texas for the Second Supreme Judicial District at Fort Worth

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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In the

Supreme Court of the United States

No. 16104

WILLIAM BIRDWELL, *et al.*,

Appellants;

v.

J. M. KIRKLAND, *et al.*,

Appellees.

WILLIAM BIRDWELL, *et al.*,

Appellants,

v.

AMERICAN BONDING COMPANY OF BALTIMORE, *et al.*,

Appellees.

Appeals from the Court of Civil Appeals of Texas for the Second Supreme Judicial District at Fort Worth

BRIEF IN OPPOSITION TO MOTION TO DISMISS

1. APPELLEES DO NOT DEFEND THE HOLDING OF THE STATE COURT

Significantly, the motion or brief does not reflect any effort to defend the basis upon which the Court of Civil Appeals at Fort Worth, Texas, decided the case in favor of

the appellees. The motion or brief does not even contain a reference thereto, citing cases upholding the Court of Civil Appeals, showing a valid defense. Obviously appellees recognize that it is indefensible.

It is shown in the first 6 questions of appellants' Statement as to Jurisdiction wherein that there was an unlawful and illegal and invalid removal order and proceedings from Bell County, Texas, to Young County, Texas; and when the guardian attempted to convey the land in question it had already been conveyed and neither the probate court nor the guardian had jurisdiction of the same, and that the guardian's deed was made in confirmation and ratification of the former deed of August 1, 1913, and that when the guardian purported to sell said land he was benefitted directly and indirectly from the sale of same, and that the attempted sale by the guardian was made without any consideration paid then nor any time thereafter, showing a total failure of consideration of the entire purchase price, and that the bonding companies, appellees herein, were liable on their bonds on the ground that all of the proceedings, orders and judgments of the Probate Court of Young County, Texas, were void, and estopped the bonding companies from questioning the jurisdiction of court and the invalidity of the record. Thus we see the appellants have shown that all the above and foregoing proceedings in the Probate Court of Young County, Texas, were all void and subject to collateral attack, which rendered the surety companies liable, and the orders purporting to release the surety companies were void, and not subject to the limitation stat-

utes, and in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

Furthermore, in view of all of the void and invalid proceedings set up by the appellants, the appellees have not denied, nor sought to explain the same, nor have they challenged the law and facts containing the same, but by their silence have impliedly shown that the law and facts are against them.

On page 2 of appellees' brief the appellants challenge the following statement: "In these suits Appellants seek to recover title to the land sold by their guardian in 1913 and also to recover from the sureties for alleged defalcations by the guardian." In answer to same appellants have made an election of their remedies on the recovery on the mineral interest and the land, *15 Tex. Jur. p. 823, Sec. 4,* and if they have not the right to recover on same, then in the alternative, they ask the court for a recovery on the bonds. Appellants are asking this Honorable Court to give appellants the right to recover on either as according to their choice and to recover the costs adjudged against them on the bonds by the Court of Civil Appeals.

At the top of page 4 of appellees' brief, being second paragraph from top wherein appellees state: "The effect of the state court decision is simply that the statute (Art. 5528) was inapplicable" as to the suit on the bonds, but upon the examination of the decisions of our courts we find that you cannot recover for the defalcation of the guardian by and through a bill of review; it must be brought under

Article 5528 of the R. C. S. of 1925 of the State of Texas, and that you cannot bring a suit to recover on the bonds under *Article 5529*. It is held in *21 Tex. Jur. p. 364, Sec. 103 (old series)*.

> "Inasmuch as the court on bill of review has * * * no authority to decree the final partition and distribution of the estate of a deceased ward, *nor to render a judgment which has the effect of holding the guardian liable as for a devastavit.*" *Nicholson v. Nicholson, 125 S. W. 965, error refused; Francis v. Northcote, 6 Tex. 186.*

QUESTION 10 (FUNDAMENTAL ERROR)

Whether at the time of the sale of the land of the wards in question by the guardian through the Probate Court of Young County, Texas, the appellees set up on pages 15 and 16 of their brief that the statute now Art. 4201 required the guardian to file a good and sufficient bond in twice the amount of the land sold, since this was not done, the bonding companies are not liable, and appellants say it rendered the judgment void and the same is a fundamental error not assigned, and in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

The appellees on said pages of their brief, state, "The bond on which American Bonding Company of Baltimore is surety is a general guardian's bond, unrelated to the sale of real estate (S. F. 23). The same is true of the bond on which the American Surety Company of New York is surety (S. F. 47, 48). In the trial court Petitioners contended that the latter bond was a guardian's sale bond rather than a gen-

eral bond, but such is clearly not the case. At that time there was in effect a statute (now Article 4201) which provided that the order of sale of real estate should require the guardian to file a good and sufficient bond * * * in twice the amount for which the real estate sold. * * * The real estate in question was sold for Two Thousand Dollars ($2,000.00), which means that a guardian's sale bond would have had to be in at least the amount of Four Thousand Dollars ($4,000.00)."

And on page 12 of appellants' Second Amended Original petition in cause No. 13468, they set up in paragraph 9 approximately what the appellees stated above, and added:

> "Said real estate sold for $2,000.00. Therefore the said sale was erroneous, for the same was not twice the value of the property, and said order is void and should be set aside. That said statute is mandatory and the order is void from the face of the record."

The appellants herein have ignored the nullity of said judgment, although they have plead the same, but have failed to set it up, thinking that they had already set up enough invalid orders to set aside said judgment, in this particular phase of the case, but since the appellees are trying to take the advantage of said invalid orders, appellants thought they had better set it up. The courts hold in 45 *Tex. Jur. p. 686, Section 252:*

> "* * * If a judgment is in fact a mere nullity there is no reason why it should not be declared so whenever the occasion arises. While a void judgment may be attacked directly as well as collaterally, there is no necessity for doing so; it need not be vacated or set aside; it may be simply ignored. And when some right

is asserted under the judgment, its invalidity may be pointed out by anyone in any kind of proceeding, *in any court, and at any time*. In other words, it may be attacked collaterally."

In the case of *Woods v. Sloan*, 9 S. W. 2d 485, holds:

"Order granting guardian's application for leave to sell ward's real estate, not requiring the guardian to give bond for twice the amount for which the land sold, as required by Rev. St. 1925, Art. 4201, a mandatory statute for protection of substantial property rights of the ward, and the guardian's report of sale not showing that such bond was given, as in fact it was not, such order and the order confirming the sale are void, and may be collaterally attacked";

and further holding the judgment is void for want of jurisdiction and power to grant the relief contained in the judgment; *Cline v. Niblo*, 8 S. W. 2d 633.

In *United States v. Walker*, 109 U. S. 258, 3 S. Ct. 277, 27 L. Ed. 927, the court held:

"Although a court may have jurisdiction over the parties and subject-matter, yet if it makes a decree which is not within the powers granted to it by the law of its origination, its decree is void."

To the same ruling is the case of *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914.

In the case of *Simpson v. Booth*, 163 S. W. 2d 1080 and 1986, the court holds:

"The probate and not the district court shall determine the necessity for the sale, direct the sale and the terms thereof; confirm the guardian's report of sale; and order the guardian to make deed to the purchaser in pursuance thereto; and that, too, only upon the

guardian giving bond in an amount equal to double the value of the personal property then on hand and the amount for which said real estate may be sold. These provisions of the statute are by the Legislature made mandatory, and unless followed, the sale of a ward's real estate is declared by the statute to be void"; and further holding: "And the guardian of the ward may not ratify or confirm the void proceedings affecting the title, and the invalidity thereof may not be waived by any acts, omission or commission, of the guardian."

In the Probate Court of Young County, Texas, in the sale of said land by the guardian where the bond was not twice the value of the real estate sold, the statute being mandatory, and the order of sale and judgment confirming the sale are void for want of jurisdiction and power to grant the relief contained in the judgment, and the same is a fundamental error, without being assigned, and can be taken advantage of at any time and in any court, and said void judgment is in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

ERROR FUNDAMENTAL

In *3 Tex. Jur. 2d p. 462, Secs. 188 and 189*, the Courts hold:

"Fundamental errors need not be assigned as error in order to be considered by an appellate court. In fact, an appellate court will take judicial notice of such errors. And it is said that the court has a duty to consider such errors without an assignment.

"In another case, the court stated that where the record affirmatively and conclusively shows that the

court rendering the judgment was without jurisdiction of the subject matter, the error will be regarded as fundamental." *Murray v. Brisco, 209 S. W. 2d 976; Smith v. Basham, 227 S. W. 853; Glenn v. Armstrong, 284 S. W. 2d 165.*

"In Thompson v. Whitmore, 18 Wall. 457, 21 L. Ed. 897, and National Exchange Bank of Tiffin v. Wiley, 195 U. S. 257, 49 L. Ed. 184, both cited with approval in Marin v. Augadahl, 247 U. S. 142, 62 L. Ed. 1038-1043, it was held that a judgment may be attacked collaterally as void for lack of jurisdiction of the subject matter or the person of the defendant, even when the judgment recites findings of jurisdictional facts such as service of summons upon the defendant. Which is in keeping with the guaranty of due process of law by both the Federal and State Constitutions * * *; and also in accord with the general rule that a void judgment is incapable of conferring any rights at any time";

and same is not due process of law.

However, it is further shown that void judgments are not due process of law as shown in *12 C. J. p. 1238, sec. 1012*, holding:

"Judgments are void, however, for want of due process where rendered without jurisdiction, * * * or without any judicial determination of the facts which alone can support it."

The said surety companies on pages 15, 16 and 17 of their brief are seeking to evade liability on the ground of the invalidity of the guardianship proceedings, in that on the 16th day of August, 1913, the American Surety Company of New York entered into a bond approved by the court in the sum of $2500.00 in order to sell the wards' real estate, and on the same day, August 16, 1913, the guardian

executed an affidavit to his application to sell the wards' real property, and was filed 11 days thereafter, which said appellees contend that it was not a sales bond but a general bond and therefore not liable on same according to law; and they further set up the invalidity of the guardianship proceedings because the bond of said surety company was not twice the value of the real estate sold and was therefore not a statutory bond but a general bond and not liable on same.

The said appellees, the insurance companies are not permitted to defend on the ground of alleged invalidity of the guardianship proceedings, and thereby escape liability for the misappropriation of funds which came into the hands of the guardian by the proceedings where the bonds were executed by the surety companies, and are estopped to deny their liability.

In the case of *Abilene State Bank v. United States Fidelity & Guaranty Company, 37 S. W. 2d 815*, it is shown in that case that the two guardians took out a guardianship on a non compos mentis at different times and the guardians entered into a bond each in order to get possession of the ward's money. After the defalcation of one of the guardians the surety company set up the fact that the two guardianships were void and the court so held for the ward had never been adjudged insane and the court never had jurisdiction.

The court held:

> "Had Garrison sued the guardian, Stanage, and the surety company for the $178.51 converted by said guardian, they would not be heard to defend on the

ground of alleged invalidity of the guardianship proceedings, and thereby escape liability for the misappropriation of the funds which came into the hands of the guardian under and by virtue of said proceedings, and the bond executed by the surety company."

Gann v. Kern, 249 S. W. 878, also holding principal and sureties estopped to the recitals in the bond; *Minchew v. Case, 143 S. W. 366.*

In addition to the above authorities, even if the second bond was a general bond as contended for by said appellees, the American Surety Company of New York is liable on it in the sale of said real estate for it was executed conditioned for the faithful performance of the duties of guardian of the estate according to law, and at the time the bond was executed on August 16, 1913, and was on the same day that the application for the sale of the real estate was executed and sworn to by the guardian to sell the land, and the same should be construed together, and it was in contemplation of all parties to sell the land, and one of the duties of the guardian was to sell the land; therefore, it is held in *American Indemnity Company v. Noble, Com. of App., 235 S. W. 867 and 869:*

> "Again, if the statute requires the guardian to execute a bond conditioned for the faithful performance of the duties of guardian of the estate according to law, and one of the statutory duties is the sale of real estate, and it is made the duty of the court in connection with the sale to exercise its discretion in exacting further or additional bond, the sureties on the general bond is liable. The special bond in such instance is but cumulative security to that of the general bond. Both bonds are for the same purpose." *21 Tex. Jur. (Rev.) p. 352, Sec. 374.*

Furthermore, the appellees, the surety companies contend that the last bond when the guardian sold the land was not a sales bond nor a statutory bond and are not liable on same; but the said sureties on the bond are liable, having voluntarily made it; it being good as a common law obligation.

It is held in *Moore v. Hanscomb, 103 S. W. 665 and 672*:

> "It does not follow because the bond given by the Guaranty Company was not authorized as a statutory bond that it is not liable for the default of the guardian occurring after it had voluntarily given a bond for the faithful performance of the guardian's duties. 'Even a voluntary bond, if not in contravention of public policy or statutory law, is binding on the makers; hence a bond given for the performance of a trust reposed, whether public or private, is valid, and, though inoperative as a statutory guardian's bond will be good as a common law bond'." *Bopp v. Hanford, 45 S. W. 744; Jones v. Hays, 27 Tex. 1; Jacobs v. Daugherty, 15 S. W. 160; Bank v. Lester, Supreme Court, 11 S. W. 626.*

It is further contended on page 18 of appellees' brief that the American Bonding Company was discharged from further liability on its bond by order of the County Court of [illegible] County on February 8, 1910 (S. F. 38). The appellants challenge such statement, and on examination of said order we see that the court never did release the said surety, but ordered him to make a new bond, which was not complied with until after the defalcation of the guardian on August 1, 1913, when the guardian profited from the sale of said land, taking $400.00 in trade for 2 horses and $112.50 in

cash and appropriated the same to his own use and benefit and after that on August 16, 1913 the guardian made a new bond, which rendered the American Bonding Company liable on said bond in the sum of $512.50 before a new surety qualified, which was sworn to by appellants in summary judgment and not denied by appellees. In the case of *New Liberty Com. School v. Merchants & Planters' Bank, 273 S. W. 330* the court held:

> "It was held that the filing of a new bond before the expiration of such time had the effect of releasing the sureties on the first bond, provided the conditions of the first bond had not been breached before the second was filed." *39 Tex. Jur. 922.*

Also, we find that when the Probate Court attempted to release the American Surety of New York on the 13th day of July, 1915, the guardian had already appropriated $400.00 worth of notes to his own use and benefit and under the same rule rendered the said surety company liable, and since said guardian never did make a new bond as ordered by the court in attempting to release said surety company, the said surety company was liable on the third note in the sum of $287.50, totalling in all $687.50 with interest added, which was sworn to by the appellants and never denied by appellees.

It appears as shown above that after the attempted release of said sureties, the court ordered the guardian to make a new bond, which was not complied with, which renders the sureties liable when the guardian disobeys a valid

order of the probate court. In *21 Tex. Jur. p. 396, Sec. 122*, it is shown:

> "Again, it appears that a breach results whenever the guardian disobeys a valid order of the probate court.
>
> "In Fahey v. Boulmay, 59 S. W. 300, the court ordered the guardian to pay over to a deceased ward's mother a portion of the estate. It was held that, upon his failure to do so, the mother had a right of action on the bond."
>
> Also, "In Ramsey v. Crow, 3 S. W. 2d 486 * * *, it appeared that the guardian had placed money in a bank. The court ordered him to withdraw it. He violated the order and the money was lost through failure of the bank. It was held that he and the bondsmen were liable".

On pages 11, 12 and 13 of appellees' brief, they seek to escape liability on the ground that appellants failed to bring suit within 4 years after they reached their majority in order to set aside the order purporting to release the American Surety Company of New York from all liability, and further set up the fact that said order of release is not subject to collateral attack. They cite many cases to support their contention, among them are *Parmley v. Parmley*, *Morse v. Morse*, *Miller v. Miller* and *Moore v. Hanscom*. Upon examination of all of these cases, we see that they are not in point for the reason that in those cases the court had jurisdiction over the parties, subject matter, and the court did not transcend its powers, and therefore not subject to collateral attack; and if the bill of reviews was not brought

in 4 years from same the orders could not be set aside, and barred by the statute of limitation.

In the case at bar, it is unlike all of those cases cited by appellees which is shown in the first 6 questions in Statement as to Jurisdiction and question 10 as shown herein. In all of those questions cited by appellants, the court never had jurisdiction which rendered all of the proceedings, orders, and judgments in the probate court void, including the purported orders relieving the surety companies from all liability, and such proceedings, orders and judgments were subject to collateral attack, and the 4 years statute of limitation did not apply to their bill of review.

On pages 19, 20 and 21 of appellees' brief they set up the fact that the appellants brought their suit in the Probate Court of Young County, Texas, on the bonds in excess of $1000.00 in order to recover on the same, which was beyond the probate court's jurisdiction. The appellants challenge that statement, the suit was brought in the probate court as a direct and a collateral attack in order to determine the liability of the sureties and to set aside the invalid and void orders also to determine the liability of the owners of the land. The appellants never asked for judgment on the bonds in the probate court, but only asked for an accounting, which was abandoned by them. Appellants brought suit in the District Court in trespass to try title to recover on the mineral rights and land, and in the alternative on the bonds. The suit on the bonds were set up on page 4 of appellants' second amended original petition in the District Court of

Young County, Texas, and filed less than 4 years after the guardian's discharge in death.

ALLOWANCE ORDER

The appellees claim on page 21 of their brief that the guardian applied to the probate court of Bell County, Texas for an order for the support and maintenance and education of said wards in the sum of $100.00 each per year, and such allowance was granted on the 10th day of January, 1910, and never revoked, it precludes the recovery of the appellants on the bonds. They further state that the guardian was the sole surviving parent of said minors, and through financial losses and ill health is unable to properly maintain and educate the said minors without using a portion of said estate.

However, it appears that he must have regained his health soon thereafter, and married Mollie Birdwell for she joined him in making a deed to J. M. Kirkland on August 1, 1913 of the wards' real estate; and on April 11, 1911 in his application for the removal of the guardianship from Bell County, Texas, he states:

> "That he is still keeping and maintaining said minors and is able, ready and willing to continue to provide for the education, maintenance and support of said minors."

This order of the court is interlocutory, not appealable and is based on the happening of some future contingency

and not a final order. The order here sought to be appealed from by its own terms is to become effective only in the event that the guardian applies the proceeds of the sale of said land to the support and education of the said minor wards, the appellants herein, and follow the statute and orders of the court, to which the guardian did not do. It is held in *3 Tex. Jur. 2d p. 344, Sec. 79:*

> "A judgment is not final and appealable where it leaves a question open for future determination or where proceedings and action of the court are necessary to complete relief, as where the court expressly retains the cause of the docket and holds the judgment open for the disposition of certain reserved matters, or where the judgment becomes effective only on the happening of some future event or contingency."

It is also held in *33 C. J. p. 1196, Sec. 129:*

> "It is a general rule that judgments must not be conditioned upon any contingency, and it must be held that an alternative or conditional judgment is wholly void." *Dodd v. Daniel, 89 S. W. 2d 495.*

Since the guardian was suspended under Article 3398 from April 4, 1910 to August 16, 1913, when the American Surety Company made a new bond a period of about 3 years, 4 months and 12 days, from which time he was prohibited from spending anything out of the estate of the minors. That since said minor, Lee Birdwell, married on the 9th day of February, and her husband took care of her from then on, and since the guardian made a bond on the 16th day of August, 1913, a period of about 5 months and

23 days, which was the only time that the guardian was permitted to pay her anything under the law, if he did pay; but she says that he did not pay her anything out of the estate nor did anybody else. And since the American Surety Company of New York asked to be released on the 15th day of July, 1915, and the guardian was ordered to make a new bond, which he refused to do, and was suspended again. The whole time the guardian was not suspended and could have paid the ward, William Birdwell, was a period of about 1 year and 11 months, but the ward, William Birdwell says that he did not pay him anything out of the estate, nor did anybody else.

According to record, the guardian never did file an annual account, or file any kind of an account showing that he paid the wards anything, nor did he ever file a final account. Under *Article 4253*, the guardian failed to file his claim which he held, if any, against the wards, at the time of his appointment, or which has since accrued, verified by his affidavit. Since the guardian did not do that, he is not entitled to credits, if he did make expenditures for the maintenance of said wards, for it is held in *Yates v. Watson, Com. App., 221 S. W. 966:*

> "One supplying necessaries, as maintenance and education, for a minor, must present his claim for amount so expended to probate court, and have it allowed and approved, and if he fails he is not entitled on final accounting as guardian, to credits for such expenditures."

Appellants respectfully submit that the Motion to Dismiss should be denied and the cases heard on briefs and oral Argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sidney E, Dawson, one of the attorneys for Appellants and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ' day of June, 1961, I served copies of the foregoing brief on the following attorneys of record for Appellees, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

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